(22,342)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 410.

SANTA FE, PRESCOTT AND PHŒNIX RAILWAY COMPANY, A CORPORATION, PLAINTIFF IN ERROR,

vs.

GRANT BROTHERS CONSTRUCTION COMPANY.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

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1 to 4 In the Supreme Court of the Territory of Arizona.

No. 1136.

SANTA FE, PRESCOTT AND PHŒNIX RAILWAY COMPANY, a Corporation, Appellant,
vs.
GRANT BROTHERS CONSTRUCTION COMPANY, a Corporation, Appellee.

On Appeal from the District Court of the Third Judicial District of the Territory of Arizona, in and for the County of Maricopa.

Mr. Paul Burks, Mr. A. H. Van Cott and Mr. L. H. Chalmers, attorneys for appellant.
Mr. I. B. Dockweiler and Mr. A. C. Baker, attorneys for appellee.

Be it remembered that on to-wit: the eighteenth day of November, 1909, came the appellant in the above entitled cause, by its attorneys Paul Burks, Esq., A. H. Van Cott, Esq., and L. H. Chalmers, Esq., and filed in the clerk's office of said court, in said entitled cause, a certain Abstract of Record in words and figures following, to-wit:

5 In the Supreme Court of the Territory of Arizona.

No. —.

SANTA FE, PRESCOTT AND PHŒNIX RAILWAY COMPANY, a Corporation, Appellant,
vs.
GRANT BROTHERS CONSTRUCTION COMPANY, a Corporation, Appellee.

ABSTRACT OF RECORD.

Complaint.

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

GRANT BROTHERS CONSTRUCTION COMPANY, a Corporation, Plaintiff,
vs.
SANTA FE, PRESCOTT AND PHŒNIX RAILWAY COMPANY, a Corporation, Defendant.

The plaintiff complaining of the defendant alleges:

6 1st. That the plaintiff, Grant Brothers Construction Company, is a corporation duly organized and existing under and by virtue of the laws of the State of California, and that said plaintiff was at all of the times hereinafter mentioned and now is en-

gaged in the business of grading, building and constructing railroad tracks, ways and beds.

2nd. That the defendant, Santa Fe, Prescott and Phœnix Railway Company, is a railroad corporation duly organized and existing under and by virtue of the laws of the Territory of Arizona, and was at all of the times hereinafter mentioned and now is a common carrier of goods, freight and passengers for hire.

3rd. That the said defendant, Santa Fe, Prescott and Phœnix Railway Company, in the prosecution and pursuit of said business of a common carrier of freight, passengers and goods for hire, owns, controls, operates, runs and manages a certain railroad, commencing at Ash Fork and running thence to Phœnix, Arizona, which said railroad is known and called Santa Fe, Prescott and Phœnix Railway. That said defendant in the like prosecution and pursuit of its said business of a common carrier also owns, controls, runs, operates and manages a railroad running from the Colorado River, Arizona, to Wickenburg, Arizona, known and called Arizona and
7 California Railroad Company, at which last named place or point the said Arizona and California Railroad connects with the said Santa Fe, Prescott and Phœnix Railway, and that by means of said railroads the defendant, as such common carrier, conveys and carries goods, freight and passengers for hire from the various points and places along the lines of said railroads to Phœnix, Arizona.

4th. That on the 12th day of December, 1904, the defendant entered into an agreement with the plaintiff whereby the defendant agreed to carry and convey over the said railroads the camp and grading outfit and supplies belonging to the plaintiff, and which plaintiff used and required in the prosecution and pursuit of its said business of grading, building and constructing railroad tracks, ways and beds, for the consideration and at the rate and price of one cent per ton mile to be paid therefor by the plaintiff, a copy of which said agreement is hereunto attached, marked "Exhibit A" and made a part thereof.

5th. That thereafter, to-wit, on or about the 5th day of June, 1907, the plaintiff delivered to the defendant, as such common carrier, at Bouse, Arizona, on the line of the said Arizona and California Railroad certain goods, the property of plaintiff, to-wit, the camp and grading outfit and supplies of the plaintiff, consisting of—(Note: Here follows itemized list of goods in outfit, which is omitted for the sake of brevity).

8 All of the value of $9061.00, and that in consideration of the tariff rate and price of one cent per ton mile to be paid therefor by the plaintiff, as in said written agreement between the plaintiff and the defendant is stipulated and agreed; the defendant then and there received the above described goods in its said capacity of a common carrier and pursuant and in conformity with the said written contract between plaintiff and defendant, to be by it safely carried over the lines of the said Arizona and California Railroad and the Santa Fe, Prescott and Phœnix Railway to Phœnix, Arizona, and there delivered to the plaintiff.

6th. That the defendant did not safely deliver and carry said

goods, but on the contrary, so negligently and carelessly misbehaved as such common carrier in regard to the said goods and the same conveyance thereof, that by reason thereof the said goods were, on or about the 6th day of June, 1907, while they were in transit on the said Arizona and California Railroad from Bouse to Phœnix, and while they were in and upon the cars of the said defendant and in its charge, burned and wholly destroyed by fire and were wholly lost to the plaintiff to its damage in the sum of $9061.00.

Wherefore the plaintiff demands judgment against the
9 defendant for the sum of $9061.00 damages and cost of suit.

A. C. BAKER,
ISADORE G. DOCKWEILER,
Attorneys for Plaintiff.

(Endorsed: Filed October 3, 1908.)

Exhibit to Complaint.

Attached to plaintiff's complaint is a copy of the Construction Contract (such portions of which as are not necessary to an understanding of its general provisions, as well as the "specifications" referred to in and attached to the original contract have, for the sake of brevity, been omitted), referred to in paragraph "4th" of said complaint and which is designated as:

"PLAINTIFF'S EXHIBIT A."

"This Agreement, made and entered into this twelfth day of December, 1904, by and between Grant Brothers Construction Company, of Los Angeles, Cal., of the first part, hereinafter called the 'Contractor,' and The Santa Fe, Prescott and Phœnix Railway Company, of the second part, hereinafter called 'Company;' Witnesseth:

"1. The Contractor in consideration of the prices hereinafter mentioned to be paid to him by the Company, hereby undertakes and agrees to do and perform to the satisfaction and acceptance of the Chief Engineer of the Company and in strict conformity with the specifications hereto attached and plans from time to time
10 furnished under the direction of said Chief Engineer, the following described work:

"The clearing for right of way; grading the roadbed ready for the rails; building the culverts as they may be required; excavating necessary ditches for diverting water to and from bridge openings and other places where they may be required by the Company's Engineer on that part of the Arizona and California Railway Company's located road from the west end of present grading to the west end of Mile Forty-six (46,) in the County of Yavapai, Territory of Arizona.

"2. The work shall be commenced within ten (10) days after the execution of these presents, and shall be completed on or before the twenty-second day of March, 1905.

"3. Should any delay be occasioned by failure on the part of the Company to furnish any material or provide any additional right of way or ground that may be necessary to insure the carrying out of this agreement, and which material, right of way or ground the said Company hereinafter agrees to provide, the Company shall not be liable to damages on account thereof, but an extension of time shall be granted to the Contractor for the completion of his contract. The additional time to be allowed shall be determined by the Chief Engineer of the Company.

"4. The work shall be performed under the supervision and according to the directions of the Chief Engineer of the Company * * * who shall have full power to reject * * * any work or material which in his * * * judgment is of * * * or not in strict accordance with the specifications * * * all of such im-
11 perfect work * * * shall be * * * made good * * * by the Contractor.

"It is mutually understood and agreed that the said Engineer shall have the power to have and defective work * * * replaced at the expense of said Contractor * * * prior to payment for the work.

"5. The Chief Engineer * * * shall be the final umpire * * * relative to the work done * * * and his decision shall be final * * * upon the parties hereto.

"6. The work embraced in this agreement shall be executed under the immediate charge of and at the sole risk of said Contractor * * * until finally accepted by the Company.

"7. The said Contractor shall be responsible for any and all damages to persons or property during the performance of the work and occasioned by his own act or negligence, or that of any of his employees. If any damages shall be done, the Chief Engineer of said Company shall have the right to assess the same and deduct the amounts thereof from the payments to be made by said Company to the said Contractor.

"8. The Contractor shall promptly pay all sub-contracts, * * * and shall deliver said work free from * * * liens * * * and in the event of any failure * * * the Company may retain from all subsequent estimates and pay over * * * such sums. Before final settlement is made the Contractor shall furnish evidence * * * that the work * * * that no claim then exists against the same for which any lien could be filed and enforced.

"9. Upon the faithful performance by the Contractors of all the conditions and requirements of this agreement * * * said Company hereby promises and agrees to pay to said Contractor
12 the following sums * * * in full for all work done and materials furnished under this contract.

(Prices omitted.)

"10. Approximate estimates of work done and materials furnished under this contract are to be made at the end of each calendar month * * * payments thereon are to be made by the Company to the Contractor * * * less all previous payments * * * percentage shall be retained by the Company until the complete per-

formance * * *. Whenever this contract shall have been completely performed * * * and the said Engineer has certified * * * said Company shall within twenty days * * * pay to said Contractor any sums remaining due * * * according to the terms of this contract.

"11. No claim for extra work shall be made by the Contractor * * * unless * * * especially authorized * * * all claims for extra work must be presented * * * at the close of the month * * * and the prices so named shall be binding upon each party to this agreement.

"12. If the Chief Engineer of the Company shall, at any time, be of the opinion that the Contractor is * * * violating any of the provisions of this contract * * * it shall be his duty * * * to direct the Contractor to * * * comply within three * * * and upon the failure or refusal * * * said Chief Engineer shall have the power * * * to declare this contract forfeited * * *.

"The Company shall also have the right * * * to complete the work * * * and the cost * * * shall be paid by the Contractor * * *.

"13. The Company shall have the right * * * to put
13 an end to this contract by giving * * * written notice * * * and the Contractor will assert no claim for damages against the Company on account thereof.

"14. Water will be delivered in cars at the end of the track at the rate of One Dollar and Fifty Cents ($1.50) per 1000 gallons and supplies will be hauled to End of Track, both in the usual manner of construction trains, subject to delays, etc., incident thereto. All risk of loss or damage to be borne by the Contractor.

"15. The Company will furnish a rate of one cent per ton mile from all points on the S. F. P. & P. Road and leased roads for the Contractor, on Camp and Grading Outfit and supplies, etc., except explosives and commissary goods, and return to original shipping points at same rates, on completion of the work. All movements of goods at less than tariff rates to be at consignee's risk of loss and damage.

"16. The Company will also furnish the Contractor's employees * * * a rate of one cent per passenger mile, * * * and return those who have worked until completion of contract at the same rate. Passengers carried at less than tariff rates will be required to assume all risk of accidents to person and baggage. The plan of movement of these employees and freight is to be according to the rules of the General Freight and Passenger Agent.

"17. The Company will also secure for the Contractor similar rates over the Santa Fe Company's Coast Lines, on Camp and Grading Outfit, in carload lots, both to and from the work, and for workmen going to the work in lots of five (5) or more.

"18. It is finally covenanted and agreed by and between
14 the parties hereto, for themselves, administrators, executors, successors and assigns, that this contract and all of its terms and provisions shall be binding upon them, and each and every one of them.

"In testimony whereof, the parties hereto have executed this instrument in duplicate, the day and year first above written.

(Signed) GRANT BROTHERS CONSTRUCTION CO.,
By J. R. GRANT, *Vice-Pres.*,
By J. A. BURTON, *Sec'y.*

(Signed) SANTA FE, PRESCOTT & PHŒNIX RY. CO.,
By W. A. DRAKE, *Chief Eng.*"

(Title of Court and Cause.)

Amended Answer.

A First Defense—Demurrer.

Comes now the defendant above named and for its Amended Answer to plaintiff's Complaint on file in the above entitled action, by way of demurrer, says:

1. That said complaint fails to state facts sufficient to constitute a cause of action against this defendant.

2. That said complaint is vague, indefinite and uncertain in that it cannot be ascertained therefrom how, or in what manner, or at what point on defendant's line of railway the camp and grading outfit and supplies described in said complaint were destroyed.

15 3. That said complaint is vague, indefinite and uncertain in that it cannot be ascertained therefrom how, or in what manner, if at all, this defendant failed properly to perform any duties owing from this defendant to plaintiff, or wherein defendant was negligent, or how or in what manner, if at all, this defendant negligently or carelessly or otherwise misbehaved as a common or other carrier in regard to any goods of plaintiff.

4. That it appears from the face of said complaint and from the contract thereunto attached and made a part thereof that this defendant was not acting as a common carrier either of freight or of passengers with respect to its transactions with plaintiff as described in said complaint, or with respect to the goods, wares, merchandise, camp and grading outfit described in said complaint, but with respect to the transportation of property of plaintiff this defendant was a private carrier and that all property of plaintiff which was transported by this defendant was transported at a greatly reduced rate pursuant to the special contract by the terms of which said plaintiff assumed all risk of loss and damage.

Wherefore, defendant having fully answered, prays judgment as to the sufficiency of said complaint and that it have and recover its costs and disbursements herein expended or incurred.

PAUL BURKS,
L. H. CHALMERS,
Attorneys for Defendant.

16 Second Defense—Denials.

Comes now defendant, and, though not waiving its defense herein interposed by way of demurrer, but for another, further and separate defense herein, and for its further answer to plaintiff's complaint, by way of answer says:

1. That it has no knowledge, information or belief as to the truth or falsity of the allegations contained in paragraph 1 of plaintiff's complaint as to the corporate existence of plaintiff, and, basing its denial upon lack of information, knowledge or belief, denies that plaintiff was at the time of the commencement of this action, or was at any other time, or is now, a corporation duly organized and existing under and by virtue of the laws of the State of California. Defendant admits that plaintiff was at the time mentioned in its complaint and is now engaged in the business of building, constructing and grading railroad tracks and railways and alleges the fact to be that the performance of such work for others pursuant to contracts therefor was and is the principal business and occupation of plaintiff.

2. That it admits that it is a railroad corporation duly organized and existing under and by virtue of the laws of the Territory of Arizona, and that it was, at all of the times mentioned in plaintiff's complaint, and is now, a common carrier of goods, freight and passengers for hire, but it expressly denies that at the times
17 mentioned in said complaint, or at any other time, or at all it was a common carrier with respect to the shipment or transportation of any goods, wares or merchandise belonging to plaintiff.

3. That it admits that it owns, controls and operates, in the prosecution and pursuit of its business as a common carrier of goods, freight and merchandise for hire, a certain line of railway commencing at Ash Fork, Arizona, and running thence to Phœnix, Arizona, and known as the Santa Fe, Prescott and Phœnix Railway Company.

4. That it admits that on the 12th day of December, 1904, it made and entered into an agreement with plaintiff as described in the fourth paragraph of plaintiff's complaint, a full, true and correct copy whereof is attached to said complaint, marked "Exhibit A" and made a part thereof, pursuant to which said agreement plaintiff undertook to and did construct defendant's railway to a point on the line of the Arizona and California Railway Company to the west end of mile 46 in the County of Yavapai, but alleges the fact to be that said agreement of December 12, 1904, was thereafter modified by an agreement in writing between the parties thereto, extending the operation of said agreement of December 12, 1904, to the construction of the Arizona and California Railway westward to
18 the Colorado River, executed by the parties thereto under date of November 24, 1905, a full, true and correct copy whereof is in words and figures as follows:

"Santa Fe, Prescott & Phœnix Railway Company.

Leased Lines:
Prescott & Eastern Railroad.
Bradshaw Mountain Railroad.
Phœnix & Eastern Railroad.

W. A. Drake, General Superintendent and Chief Engineer.

Please quote file 1898A in your reply.

PRESCOTT, ARIZ., *Nov.* 24, 1905.

Grant Bros. Construction Co., Los Angeles, Cal.

GENTLEMEN: "Concerning the contract for grading the Arizona and California Railway west toward the Colorado River from Salome, in accordance with the terms and conditions for grading that part of the road east from Salome, it seems that we should have some record of the understanding between the parties interested.

"In conversation a few days since with your Mr. J. A. Cashion, he advised that your company will continue the grading westward to the Colorado River under the same terms and conditions of the contract which existed covering the grading east of Salome, provided the Arizona & California Railway Company will increase the prices named in that contract on each class of earth one cent per cubic yard and on each class of loose and solid rock five cents per
19 cubic yard and that the Arizona and California Railway Company will deliver water by the carload at the end of track free of cost except for car hire, and that the Arizona and California Railway Company will also haul men and supplies to the end of track free.

"These provisions were submitted to Mr. Murphy and are, for the Arizona and California Railway Company, accepted by him, except that the free haul of men and supplies can only apply between A. & C. Junction and the end of the track; that the company shall assume no obligation or risk in case of accident or damage to men and supplies, it being understood that these provisions and conditions shall become effective on the 1st day of December, 1905, and thereafter.

"Your acceptance written across the face of this letter and signed by your company will provide for the continuance of the work in accordance therewith.

Yours truly,

W. A. DRAKE.

D. L.

cc. J. A. Cashion, Phœnix."

"The foregoing terms and conditions accepted by Grant Brothers Construction Co.

By J. R. GRANT,
President."

That said acceptance of plaintiff was written across the face of said letter as therein provided.

That it alleges the fact to be that all goods, wares and merchandise transported by it for the plaintiff were transported under and pursuant to the terms of said agreement of December 12, 1904,
20 as modified by the terms of said agreement of November 24, 1905, and that no goods, wares or merchandise belonging to plaintiff were received for transportation or transported by the defendant over any part of its lines of railway at any time except upon and pursuant to the terms and conditions set forth and contained in said agreement of December 12, 1904, or of such agreement as modified by the terms of said agreement of November 24, 1905.

5. That it denied that on or about the 5th day of June, 1907, or at any other time, or at all, plaintiff delivered to this defendant as a common carrier at Bouse, Arizona, on the line of railway of the Arizona and California Railway Company, or at any other place, or at all, any goods or property of plaintiff described in the fifth paragraph of plaintiff's complaint and denies that the goods or property described in said fifth paragraph of plaintiff's complaint were of the value of $9061.00 as therein alleged and further denies that the goods described in said fifth paragraph of plaintiff's complaint, or any other goods, were offered to or received by this defendant to be transported by it from Bouse to Phœnix in consideration of the tariff or price of one cent per ton mile, to be paid therefor by plaintiff as in said agreement of December 12, 1904, provided; but this defendant alleges the fact to be that it did on or about June 5, 1907, as a private carrier, but not otherwise, receive from plaintiff at Bouse, Arizona,
21 certain goods, wares and merchandise, belonging to plaintiff to be transported by this defendant from Bouse, Arizona, on the line of the Arizona and California Railway Company to A. & C. Junction on the line of railway of this defendant without any cost, charge or expense whatever to plaintiff, and to be transported from said A. & C. Junction to Phœnix over the railway line of this defendant at the rate of one cent per ton mile in accordance with and pursuant to said agreement of December 12, 1904, as modified by said agreement of November 24, 1905, but not otherwise, and this defendant alleges the fact to be that the goods so received were transported by this defendant to A. & C. Junction at which point certain cars containing certain goods of plaintiff were set out on the side track at said station last mentioned by it at about 11:30 o'clock p. m., June 5, 1907, to be there picked up byand transported to Phœnix over the line of railway of this defendant by its next regular freight train en route to Phœnix and that while the goods so set out were on the sidetrack at A. & C. Junction and in the cars wherein they had been placed by plaintiff, certain of said goods were destroyed by fire, without fault, negligence, carelessness or improper conduct on the part of this defendant, and that the destruction of said goods by fire did not result from and was not caused by any negligent act or omission on the part of this defendant.

22 6. That it denies that it failed or neglected safely to transport any goods belonging to plaintiff and it expressly denies that it at any time negligently or carelessly conducted itself or negligently or carelessly misbehaved as a common carrier, or otherwise, in regard to or with respect to any goods, wares or merchandise of plaintiff or in regard to or with respect to the safe conveyance or transportation thereof and expressly denies that by reason of any negligence, carelessness or improper conduct on the part of this defendant, or of its agents or employees, the camp and grading outfit of plaintiff described in said complaint was, on or about the 6th day of June, 1907, or at any other time, destroyed by fire or lost to the plaintiff.

7. That it alleges the fact to be that if the camp and grading outfit described in plaintiff's complaint was destroyed by fire or was otherwise destroyed, such destruction was caused by and resulted wholly from the negligence, carelessness and improper conduct of the plaintiff and its agents, servants and employees, and did not result from any negligent act or omission on the part of this defendant or any of its agents, servants or employees.

8. That, except as herein otherwise expressly admitted or denied, it denies, generally and specifically, each and every, all and
23 singular, of the allegations in plaintiff's complaint set forth and contained.

Wherefore, defendant having fully answered, prays that plaintiff take nothing by this action and that it have and recover its costs and disbursements herein expended or incurred.

PAUL BURKS,
L. H. CHALMERS,
Attorneys for Defendant.

(Duly verified.)

(Endorsed: Filed May 1, 1909.)

Verdict of the Jury.

"We, the jury empaneled and sworn in the above entitled action, upon our oaths do find for plaintiff and assess its damages at Nine Thousand Sixty-one dollars ($9,061.00.)

"(Signed) C. S. BERRYMAN,
"Foreman."

(Endorsed: Filed May 9, 1909.)

Judgment.

This action came on regularly for trial, the said parties appearing by their attorneys, Isadore B. Dockweiler and A. C. Baker, counsel for plaintiff, and Paul Burks, L. H. Chalmers and A. H. Van Cott, for defendant. A jury of twelve persons was regularly impaneled and sworn to try said action. Witnesses on the part of the plaintiff and the defendant were sworn and examined, and docu-
24 mentary evidence was introduced. After hearing the evidence and the arguments of counsel and instructions of the

Court, the jury retired to consider of their verdict and subsequently returned into court with the verdict signed by the foreman, and, being called, answered to their names, and say:

"We, the jury duly impaneled and sworn in the above entitled action, upon our oaths do find for plaintiff and assess its damages at Nine Thousand Sixty-one Dollars ($9,061.00).

"C. S. BARRYMAN,
"Foreman."

Wherefore, by virtue of the law and by reason of the premises aforesaid;

It is hereby ordered, adjudged and agreed, that said plaintiff have and recover from said defendant the sum of Nine Thousand, Sixty-one Dollars ($9061), with interest thereon at 6% per annum from the date hereof until paid, together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of One Hundred Ninety and 45-100 dollars ($190.45).

Dated May 8th, 1909.

EDWARD KENT, *Judge.*

(Endorsed: Filed May 11, 1909.)

25 *Motion for New Trial.*

(Title of Court and Cause.)

Comes now the defendant in the above entitled cause, by its attorneys, and moves the Court to vacate and set aside the verdict rendered on the 8th day of May, 1909, in the above entitled cause, and to grant the defendant a new trial of this cause.

This motion is made and based upon the following reasons:

I.

The Court erred in overruling defendant's demurrer to plaintiff's complaint on file herein.

II.

That the Court erred in admitting evidence offered by the plaintiff on the trial of this cause and objected to by the defendant.

III.

That the Court erred in rejecting evidence offered by the defendant in the trial of this cause and objected to by plaintiff.

IV.

That the Court erred in charging the jury by refusing to give instructions requested by the defendant and giving instructions requested by plaintiff.

26

V.

The verdict of the jury rendered and entered herein on May 8, 1909, is contrary to the law.

VI.

That the verdict given and rendered herein on May 8, 1909, is contrary to and is not sustained by the evidence introduced upon the trial of the above case.

VII.

That the verdict given, rendered and entered herein on May 8, 1909, finding the issues in favor of the plaintiff and fixing the damages in the sum of $9061.00 is excessive in that all the evidence introduced in said cause failed to show that the plaintiff was damaged in any such sum of money.

IX.

That the verdict rendered, given and entered herein on the 8th day of May, 1909, was rendered and given under the influence of passion and prejudice and is manifestly a perverse disregard of justice.

X.

That the Court erred in not granting the defendant's motion to direct the jury to return a verdict for the defendant at the close of plaintiff's testimony.

27

XI.

That the Court erred in overruling defendant's motion to direct the jury to return a verdict for the defendant at the close of the testimony for defendant.

(Signed) PAUL BURKS,
(Signed) L. H. CHALMERS,
Attorneys for Defendant.

(Endorsed: Filed May 11, 1909.)

Clerk's Minute Entries.

(Title of Court and Cause.)

No. 5595.

Be it remembered, That heretofore and on, to-wit: the 31st day of October, A. D. 1908, the same being one of the regular juridical days of the October Term, A. D. 1908, of the District Court, the following order, inter alia, was made and entered of record in said Court in the above entitled cause, which said order is in words and figures as follows, to-wit:

(Title of Court and Cause.)

At this day it is ordered by the Court that the Plea in Abatement and demurrer of the defendant to the complaint herein be continued until November 7th, proximo.

And afterwards and upon, to-wit, the 7th day of November, A. D. 1908, the same being one of the regular juridical days of the October Term, A. D. 1908, of said Court, the following order,
28 inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Court and Cause.)

At this day it is ordered by the Court that the plea in bar and demurrer of the defendant to the complaint herein be reset for hearing Saturday, November 21st, instant.

And afterwards and upon, to-wit, the 21st day of November, A. D. 1908, the same being one of the regular juridical days of the October Term, A. D. 1908, of said Court, the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Court and Cause.)

At this day by consent it is ordered by the Court that the plea in bar and demurrer of the defendant to the complaint herein be reset for hearing Saturday, November 28th, instant.

And afterwards and upon, to-wit, the 28th day of November, A. D. 1908, the same being one of the regular juridical days of the October Term, A. D. 1908, of said Court, the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

29 (Title of Court and Cause.)

At this day it is ordered by the Court that the plea in abatement and demurrer of the defendant to the complaint herein be reset for hearing December 5th, proximo.

And afterwards, and upon, to-wit, the 5th day of December, A. D. 1908, the same being one of the regular juridical days of the October Term, A. D. 1908, of said Court, the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Court and Cause.)

At this day, both parties consenting, it is ordered by the Court that the plea in abatement and demurrer of the defendant to the complaint herein be reset for hearing January 2nd, proximo.

And afterwards and upon, to-wit, the 2nd day of January, A. D. 1909, the same being one of the regular juridical days of the October Term, A. D. 1908, of said Court, the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Court and Cause.)

At this day it is ordered by the Court that the plea of the
30 defendant and the demurrer to the plaintiff's complaint herein be reset for hearing the first law day in February, proximo.

And afterwards and upon, to-wit, the 27th day of March, A. D. 1909, the same being one of the regular juridical days of the October Term, A. D. 1908, of said Court, the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Court and Cause.)

At this day the plea in abatement is hereby withdrawn by the defendant herein.

And afterwards, and upon, to-wit, the same day the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Court and Cause.)

At this day the matter coming on to be heard on the demurrer of the defendant to the complaint herein, the said defendant not urging his demurrer, it is ordered by the Court that the same be and it is hereby overruled.

And afterwards, and upon, to-wit, the 19th day of April, A. D. 1909, the same being one of the regular juridical days of the April Term, A. D. 1909, of said Court, the following order,
31 inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Court and Cause.)

At this day on call of the calendar comes the said plaintiff company and demands a jury for the trial of this cause.

And afterwards, and upon, to-wit, the same day, the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows:

(Title of Court and Cause.)

At this day on call of the calender it is ordered by the Court that this cause be set for trial May 6th, proximo.

And afterwards and upon, to-wit, the 6th day of May, A. D. 1909, the same being one of the regular juridical days of the April Term, A. D. 1909, of said Court, the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Court and Cause.)

At this day on motion of defendant's attorneys, it is ordered that A. H. Van Cott of the California Bar be allowed to appear
32 in this Court for the purpose of this case, and that he be associated herein as one of the attorneys for said defendant.

And afterwards, and upon, to-wit, the same day, the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Court and Cause.)

At this day on motion of A. C. Baker, it is ordered that Isadore B. Dockweiler of the California Bar be allowed to appear in this Court for the purposes of this case.

And afterwards, and upon, to-wit, the same day, the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows:

(Title of Court and Cause.)

At this day on motion of plaintiff, the defendant consenting, it is ordered by the Court that the plaintiff have leave to amend paragraph six of its complaint herein, instanter, by interlineation.

And afterwards, and upon, to-wit, the same day, the following order, inter alia, was made and entered of record in said Court in said cause, which order is in words and figures as follows, to-wit:

33 (Title of Court and Cause.)

At this day the said plaintiff by Isadore B. Dockweiler, Esq., and A. C. Baker, Esq., its attorneys, and the said defendant by Paul Burks, Esq., L. H. Chalmers, Esq., and A. H. Van Cott, Esq., its attorneys, also comes, and thereupon this cause coming on for trial on the issues herein joined, twenty men are called into the jury box, and after the examination of them and the exercise of the

peremptory challenges by the respective counsel, the following named twelve men, viz.: W. A. Ensign, J. T. Bowles, Geo. A. Tweed, A. C. Bellar, Joe Asher, M. D. Norvinger, J. O. Toney, W. W. Edwards, Jacob Miller, Claude S. Berryman, James M. Bryant, Luke Hardin are duly selected and tried, empaneled and sworn, to well and truly try the matter at issue herein between Grant Bros. Construction Company, plaintiff, and the Santa Fe, P. & P. Ry. Co., defendant, and a true verdict give according to the law and the evidence, and thereupon after an opening statement by A. C. Baker, Esq., one of the attorneys for the plaintiff, comes the evidence on behalf of the plaintiff until the hour of noon recess, and the said jurors are admonished by the Court that it is their duty not to converse among themselves or with anyone else on any subject connected with the trial, or to form or express any opinion thereon, until the case is finally submitted to them, and are permitted
34 to separate to meet the Court at its next incoming at 1:30 P. M. this day.

And afterwards and upon, to-wit, the same day, the following order, inter alia, was made and entered of record in said Court in said cause, which order is in words and figures as follows, to-wit:

(Title of Court and Cause.)

At this day after recess come again the parties hereto by their attorneys respectively, and the said jurors being called by the Clerk, all answering to their names, and being all now here present and in the jury box, the trial of the issues herein joined is resumed.

And thereupon comes the further evidence for the plaintiff, with the exception of the proof as to the amount of damages sustained, and plaintiff rests.

And thereupon the said jurors are admonished as heretofore and excluded from the court room and the defendant by its attorneys then moves the Court to instruct the jury to return a verdict for the defendant, which motion is partially argued by defendant's attorneys, when the jury is recalled, admonished as heretofore, and permitted to separate to meet the Court at its incoming at 9:30 A. M., May 7th, inst., and the argument of the motion to
35 instruct is then resumed, and concluded, and by consent is submitted to the Court for its further consideration.

And afterwards and upon, to-wit, the 7th day of May, A. D. 1909, the same being one of the regular juridical days of the April Term, A. D. 1909, of said Court, the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Court and Cause.)

At this day come again the parties hereto by their attorneys respectively and this matter having been heretofore submitted to the

Court on the motion of the said defendant to instruct the jury to return a verdict for the defendant, and by the Court taken under advisement during the recess of the Court, and the Court having considered the same and being now fully advised in the premises, and the said jurors being absent from the Court room, doth now deny said motion.

And afterwards and upon, to-wit, the same day, the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Court and Cause.)

36 At this day the parties hereto being present in Court by their attorneys respectively, the said jurors are called into Court, are called by the Clerk, and all answering to their names, and being now here present and in the jury box, the trial of the issues herein joined is resumed.

And thereupon comes the further evidence on the part of plaintiff on the question of damages, and plaintiff rests.

And thereupon the defendant, by its attorneys, renews its motion that the Court instruct the jury to return a verdict for the defendant, which motion is submitted without argument, and by the Court denied.

And thereupon after an opening statement by A. H. Van Cott, Esq., for the defendant comes the evidence for the defendant, until the hour of the noon recess when the said jurors are admonished by the Court as heretofore, and are permitted to separate to meet the Court at its incoming at 1:30 P. M. this day.

And afterwards, and upon, to-wit, the same day, the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Court and Cause.)

37 At this day after the noon recess, come again the parties hereto by their attorneys respectively, and the said jurors being called by the clerk and all answering to their names, and being all now here present and in the jury box, the trial of the issues herein joined is resumed.

And thereupon comes the further evidence of the defendant to its conclusion, the plaintiff offering no evidence in rebuttal, the evidence is ordered closed.

Whereupon the said jurors are admonished by the Court as heretofore and are permitted to separate to meet the Court at 10:30 A. M., May 8th inst., and thereupon defendant renews its motion on the several grounds urged, to have the Court instruct the jury to return a verdict for the defendant, which motion is argued by counsel and denied, and the further trial of this cause is then suspended until 10:30 A. M. May 8th, inst.

And afterwards, and upon, to-wit, the 8th day of May, A. D. 1909, the same being one of the regular juridical days of the April Term, A. D. 1909, of said Court, the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Court and Cause.)

At this day come the parties hereto by their attorneys respectively, and the said jurors being called by the Clerk, all answering to their names and being all now here present and in the jury box,
38 the trial of the issues herein joined is resumed.

And thereupon comes the argument of counsel to the jury to the hour of the noon recess, when the said jurors are admonished by the Court as heretofore, and are permitted to separate to meet the Court at its incoming at 1:15 P. M.

And afterwards and upon, to-wit, the same day, the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Court and Cause.)

At this day after recess come again the parties hereto by their attorneys respectively, and the said jurors being called by the Clerk, all answering to their names and being all now here present and in the jury box, the trial of the issues herein joined is resumed.

And thereupon comes the further argument of counsel to the jury at the conclusion of which the jury is instructed by the Court as to the law, both orally, the instructions being taken down in shorthand by the court reporter, and in writing, and the said jurors then retire in charge of their two sworn bailiffs, to consider of their verdict herein.

And afterwards and upon, to-wit, the same day, the follow-
39 ing order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Court and Cause.)

At this day come again the parties hereto by their attorneys respectively, and the said jurors are brought into court, are called by the Clerk, all answer to their names, and being all now present in the jury box, return to the Court their verdict, which is ordered to be recorded by the Clerk, and is in words and figures as follows, to-wit: Grant Bros. Construction Co., a corporation, plaintiff, against Santa Fe, Prescott & Phoenix Ry. Co., a corporation, defendant, Verdict. We, the jury duly empaneled and sworn in the above entitled action, upon our oaths do find for the plaintiff and assess its damages at $9160.00. C. S. Berryman, Foreman.

And the verdict being so received and recorded the said jurors are polled by the Clerk at the request of defendant's attorneys and each of said jurors answers that it is his verdict.

And thereupon the said plaintiff by its attorneys moves the Court that the said jurors be sent back to their jury room to correct their verdict herein, and after due consideration and defendant by its attorneys consenting thereto, the said jurors are sent back to their jury room in charge of their two sworn bailiffs, with in-
40 structions to correct their verdict to an amount not exceeding the amount fixed by the original instructions of the Court, and by consent the reception and recording of the verdict for $9061.00 is to be held for naught.

And afterwards and upon, to-wit, the same day, the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Court and Cause.)

At this day come again the parties hereto by their attorneys respectively and the jurors are brought into court and being called by the Clerk and all answering to their names, and being all now here present and in the jury box, they by their foreman return into Court their verdict, which is by the Court ordered recorded by the Clerk, and is in words and figures as follows, to-wit: Grant Bros. Construction Company, a corporation, plaintiff, against Santa Fe, Prescott & Phoenix Ry. Co., a corporation, defendant. Verdict. We, the jury duly empaneled and sworn in the above entitled action, upon our oaths do find for the plaintiff and assess its damages at nine thousand and sixty-one dollars ($9061). C. S. Berryman, Foreman.

And the verdict being so received and recorded is read to
41 the said jurors by the Clerk, and they each replying that it is their verdict, is accepted by the Court, and the said jurors are discharged from the further consideration of this case.

And it is ordered by the Court that judgment be entered on the verdict, and when signed by the Court that the same be recorded in the Judgment Book.

And afterwards and upon, to-wit, the same day, the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Court and Cause.)

At this day, plaintiff consenting, it is ordered by the Court that execution be stayed in this case until after the filing and disposition of defendant's motion for a new trial, which defendant by its attorneys announces will be filed within the statutory time.

And afterwards and upon, to-wit, the 15th day of May, A. D. 1909, the same being one of the regular juridical days of the April

Term, A. D. 1909, of said Court, the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

42 (Title of Court and Cause.)

At this day it is ordered by the Court that the motion of said defendant for a new trial and exceptions to cost statement, be continued until May 22nd, inst.

And afterwards and upon, to-wit, the 22nd day of May, A. D. 1909, the same being one of the regular juridical days of the April Term, A. D. 1909, of the said Court, the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Court and Cause.)

At this day this matter being called for hearing on defendant's exceptions to plaintiff's statement of costs, plaintiff by its attorneys admits that the items objected to, to-wit, the witness fees of the witnesses, Wilson and Dignan, are improper charges and it is ordered by the Court that the last two items be stricken from the cost bill.

And afterwards and upon, to-wit, the same day, the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Court and Cause.)

43 At this day on motion of defendant's attorney, it is ordered by the Court that defendant's motion for a new trial be reset for hearing May 29th, inst.

And afterwards and upon, to-wit, the 29th day of May, A. D. 1909, the same being one of the regular juridical days of the April Term, A. D. 1909, of said Court, the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Court and Cause.)

At this day this matter being called for hearing on the motion of the said defendant to set aside the verdict of the jury and the judgment herein and for a new trial in this behalf, by consent of counsel, A. C. Baker, Esq., appearing for said plaintiff, and L. H. Chalmers, Esq., for said defendant, it is submitted to the Court without argument and the Court being now sufficiently advised in the premises doth deny said motion.

And afterwards and upon, to-wit, the same day, the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Court and Cause.)

44 At this day comes the said defendant by L. H. Chalmers, Esq., one of its attorneys, and in open court gives notice of its appeal to the Supreme Court of Arizona, from the judgment rendered against it herein, and the order denying its motion for a new trial.

And afterwards and upon, to-wit, the same day, the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Court and Cause.)

At this day, by consent, A. C. Baker, Esq., appearing for said plaintiff, and L. H. Chalmers, Esq., appearing for said defendant, it is ordered by the Court that execution on the judgment herein be stayed until October 1, 1909, and that the defendant have until that time to file its record on appeal in the office of the Clerk of the Supreme Court of Arizona.

And afterwards and upon, to-wit, the 19th day of June, A. D. 1909, the same being one of the regular juridical days of the April Term, A. D. 1909, of said Court, the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

(Title of Court and Cause.)

45 At this day on motion of said defendant, it is ordered by the Court that the time for filing reporter's transcript and statement of facts be extended until September 10, inst. (Note: By stipulation of counsel for plaintiff and appellee this time was thereafter extended until October 1, A. D. 1909.)

And afterwards and upon, to-wit, the 19th day of July, A. D. 1909, there was filed in the office of the Clerk of said Court in said case a supersedeas bond, which supersedeas bond, with the endorsements thereon, is in words and figures as follows, to-wit.

(In the original transcript of the record there is included a copy of the supersedeas bond and of the appeal bond filed by appellant which, together with the minute entries are certified to by the Clerk, but which we omit here for the sake of brevity, inasmuch as they are not necessary to inform the Court of the errors relied upon.)

(Duly certified by Clerk.)

Statement of the Case.

Witnesses called and sworn on behalf of plaintiff were examined and testified as follows:

NOTE.—Figures in parenthesis ( ) refer to page numbers of Reporter's Transcript of the Testimony.)

46 Plaintiff introduced in evidence as "Plaintiff's Exhibit A" (1), a certified copy of its Articles of Incorporation and it was admitted by defendant that plaintiff was at all of the times mentioned in its complaint and now is a California corporation engaged in the business of grading, building and constructing railroad tracks, wye-tracks and beds. (2).

G. D. O'BRIEN, called as a witness on behalf of plaintiff, was duly sworn and testified as follows:

On direct examination (2):

My name is George Duncan O'Brien, I am thirty-six years old and my occupation is Camp Foreman. On June 5th, 1907, I was Storekeeper for Grant Brothers at Bouse, Arizona.

On June 5, 1907, I remember that I was engaged in checking and loading Grant Brothers' grading outfit and camp equipment which they were shipping from a point between Bouse and the Colorado River. There were four foremen and four gangs of men loading the cars. Myself and two other men checked everything that was put in. I was bookkeeper for the camp at the time and personally made an itemized statement of each and every article of property belonging to Grant Brothers which was placed in the cars that day at or near Bouse. I have that itemized statement. (Here witness produces the statement referred to which was introduced as "Plaintiff's Exhibit B" and which is identical with the list
47 set out in plaintiff's complaint). (3). That list contains a true and correct list of every article of merchandise belonging to plaintiff shipped by me on June 5, 1907, from this point near Bouse.

These goods were placed on the cars at a point about twelve miles from Bouse, as near as I can remember, and the loaded cars were then hauled to Bouse, and from there were billed to Phœnix, Arizona. The same train that hauled the loaded cars from the end of the track continued on, through Bouse, and took them to A. & C. Junction, where several cars of the train were set out on the Santa Fe, Prescott and Phœnix Spur, a siding a- A. & C. Junction, and the balance of the train was taken to Wickenburg on its road to Phœnix.

In that part of the train which was taken to Wickenburg there was one car of mules belonging to L. C. Rice which had been used by Grant Brothers. That is the only part of the shipment that I know of that was taken on to Wickenburg. I went on to Wickenburg and from there to Phœnix the same night. The men and the stock only were taken to Wickenburg. The rest of the outfit, consisting of nine cars, was sidetracked at A. & C. Junction.

These nine cars set out at A. & C. Junction contained the complete grading outfit for two camps described in "Plaintiff's Exhibit B." Of the nine cars, two were box cars, two or three were flat cars and the rest were gondolas. Two flat and two box cars were
48 burned. After the cars were set out the train continued on to Wickenburg and from there I went on to Phœnix on the passenger train.

Later, in the Santa Fe Yards at Phœnix, Arizona, about June 8th of 9th, 1907, I checked up some of the goods which had previously been placed on the cars and which I had checked at the time of loading. (The witness then reads what he stated to be "a list of each and every article so checked," which list (12) is omitted for the sake of brevity, the items therein enumerated not having been disputed.)

I was never at A. & C. Junction prior to June 5, 1907, except to pass through at which time there were no residences there. There was no station agent there representing the defendant. There was no water tank there at that time. There was nothing in the way of improvements except a wye. It was practically an open desert.

Thereupon the witness, over the objection of defendant's counsel, testified as follows:

By Mr. DOCKWEILER:

"Q. On June 7, 1907, were there any inhabitants at the A. & C. Junction?"

By Mr. BURKS: "We make the same objection that the question is incompetent, irrelevant and immaterial."

The COURT: "I overrule the objection."

49 "A. I believe not (continuing after next question). There was no station agent there representing the defendant and there was no water tank there at that time nor any improvements except a wye. It was practically an open desert."

On cross-examination (14):

I had charge of the checking and not of the loading of the grading outfit of plaintiff. Martin McMahon was Superintendent and Pete Call, Davidson and two other men whose names I don't remember were foremen and they had charge of the loading. All the men were Americans and knew their business and there was no need for foremen.

There were three of us, myself and two other checkers, checking the goods as they were placed in the cars. When we had finished the other two checkers gave me their lists and from them and my list I made up the itemized list which is marked "Plaintiff's Exhibit B." These goods were loaded at the front about twelve miles west of Bouse, between Bouse and Parker.

There were two camps out there about four miles apart. Everything from both camps was hauled to the end of the track and there loaded on the cars which were there, and were then hauled to Bouse and from Bouse to A. & C. Junction in the same train in which the goods had been loaded at the end of the track. The train con-

tained one car of mules but no other live stock that I know
50 of except some dogs which were loaded in one of the box cars containing straight camp outfit.

I am not able to tell at this time what camp and grading outfit was loaded into each particular car, but that list which I produced and which was marked "Plaintiff's Exhibit B" shows the car numbers and what went into each car. That list was made out in its present form about June 8th, 9th or 10th. The reason that the contents of each car were listed separately was in order to get them through the Customs House and across the line into Mexico without unloading them. The typewritten list which I have (Plaintiff's Exhibit B) was made out from the separate lists furnished me by the other two men and my own about June 9th, here in Phœnix.

When the cars were loaded nobody representing the Railway Company was present.

When I said the cars were billed, I meant that at Bouse I made out a list of the car numbers, but not a list of the goods (20) and gave it to the Railway Agent at Bouse, I think his name was Reeder. He didn't give me anything. He made a waybill, one sheet for the entire train. I do not remember him giving me a copy. I was in charge of seeing that the goods were forwarded for Grant Brothers. I received nothing in exchange for the bill or list I gave to the Agent.

On direct examination (21):

51 During the process of loading the camp equipment on those cars, I was present during the whole proceeding. I watched every article placed on the cars I was checking. Two other men were checking, Curley Powers and Tom White. I kept the list up all the time. As soon as Powers and White had finished a page in their books, they would turn it over to me. I was there all the time—the length of the train. There was only three, or at most four, cars being loaded at one time.

I saw the Agent at Bouse make out a paper. It was a list of the cars necessary for the Conductor for his train. The Agent folded it up and put it out on his desk and the Conductor took it with some other papers. The Conductor was working for the Santa Fe, Prescott and Phœnix Railway Company, or the A. & C. He wore a Conductor's badge which indicated his position. The Conductor was Ed Dignan. The brakeman's name was Fatty Gregg.

On cross-examination (24):

Curley Powers had been foreman for Grant Brothers. His work as foreman was finished up and he was helping us load and check. Tom White had been foreman too. There were two foremen besides them. I don't remember their names. The whole thing was under one camp and one camp finished before the other did.

After the loading was finished McMahon and Call came
52 right through to Phœnix. Powers and White also came through. I bought transportation at Bouse for everybody at the contract price, sixty cents to Phœnix. I bought transportation for about fifty men and McMahon, Call, White and Powers came

through to Phœnix with me and the rest of the men, all on one ticket. The other men were regular day laborers engaged in the construction work. There was a caboose and coach on the train and we all went together on the regular train which ran between Wickenburg and the front—Bouse to Wickenburg, which was the destination of that train and the end of the train crew's run.

G. D. O'BRIEN, recalled, testified as follows:

On direct examination (38):

The goods listed in the list (Plaintiff's Exhibit B) were not all of the stuff loaded by me near Bouse. They were only the part destroyed by fire.

The numbers of the cars destroyed by fire were: T&NO 20320, SP 78084, SP 84437 and SP 80116.

MARTIN MACMAHON, called as a witness on behalf of plaintiff, was duly sworn and testified as follows:

On direct examination (29):

My name is Martin MacMahon and I am forty-nine years old. On June 5, 1907, I was General Superintendent of the works for Grant Brothers, west of Bouse, Arizona. On June 5th, we
53 loaded part of the outfit and part of it on June 6, about seven miles this side of Parker and about twelve miles west of Bouse, on the A. & C. Railway. When the loading was done Pete Call and Tom Clark and some other party besides myself and Mr. O'Brien, head bookkeeper at the camp, were present. I was Superintendent and in charge of the loading of the outfit on the cars. O'Brien was supposed to be looking after the record of the things put on the cars and had a couple of men helping him. I saw him noting what went into the cars and checking them. He was there most of the time. He may have been away once in a while but most of the time he was there right around the cars.

After the cars were loaded they left there about two or three oclock on June 5th or 6th. I don't remember the date exactly but it was in the early part of June, 1907, I think the 5th. The loaded cars were pulled to Bouse and stopped there and we unloaded some powder there and shipped it in another train and also unloaded some hay. I told Mr. O'Brien to get the shipping bills for the outfit to go through to Phœnix, and also the stock, a carload of mules which belong*ing* to another man, to go through to Los Angeles. I don't know what Mr. O'Brien did about shipping the goods as I did not ask him. We next pulled into the A. & C. Junction. The cars which I referred to were switched out and placed on the side track at
54 A. & C. Junction. I spoke to the Conductor at A. & C. Junction and asked him what he wanted to set them out there for. He said they wanted to go there—all camp outfits—that they did not have room for them at Wickenburg as the yards were full of other cars that came in the day before and were on the side track, so that he had no room at Wickenburg. He said that he thought

that the train that came in the day before with cars from Bouse was still on the sidetrack at Wickenburg and that there wouldn't be room for these. Nothing else was said to me by the Conductor and we then went on to Wickenburg and waited for the train to Phœnix. The same Conductor went with us to Wickenburg and also took a car of live stock.

I don't know as there was anything at A. & C. Junction but the trackage. There had been an agent there but I don't think there is any there at present or that there was any agent there on June 5th, 1907.

That is all I seen there except where they marked on a check book that they had in a box. There had been a small station there but I saw no other houses and no inhabitants and no water tanks.

On cross-examination (36):

I don't know what time it was when we reached A. & C. Junction, but it was after dark, probably eight o'clock. After we left
55 A. & C. Junction it was not more than twenty minutes before we got into Wickenburg. It might have been about 10:20 when we got into A. & C. Junction. They stopped there quite a while switching and as soon as we got through we ran in quickly.

I was superintending the loading of this outfit at the front after Grant Brothers got through with their work under their contract on the A. & C. Road. O'Brien was kind of head book man and was supposed to be working under me. There were three or four subforemen under me. I don't know their names except Curley Powers and Tom White. I told these subforemen what to load first. All the cars were loaded there and brought to Bouse, where we unloaded some powder that was brought into Bouse with the other goods. We had loaded this powder at the front with the other goods and took it into Bouse to have it shipped with some other goods. We also unloaded a few bales of hay. We disposed of the hay there. We unloaded about twenty-five bags of powder from a box car at Bouse.

I don't know how they happened to get the transportation at Bouse. I think plaintiff had free transportation for the men to Wickenburg. It was part of O'Brien's duty to arrange for the transportation. All the men that were on the books, that had been working there, came in with us. I don't know how many men were on the books
56 but there were about thirty-five or forty on the last shipment in here and we all came along with the goods, part of which were set out at A. & C. Junction.

PETE CALL, called as witness on behalf of plaintiff, being first duly sworn, testified as fololws:

On direct examination (40):

My name is Pete Call and I am thirty-eight years old. On June 5, 1907, I was Camp Foreman for Grant Brothers Construction Company at Bouse, Arizona. On June 5th, we were loading the camp outfit of Grant Brothers about twelve miles from Bouse at a siding. I assisted in loading it. A fellow named Clark, one named Schmidt,

one named Curley and also a couple of Mexican Foremen assisted. Myself, Clark, George O'Brien, Mart MacMahon and Smitty were all actually engaged in putting the stuff on the cars. MacMahon was Superintendent of the loading and O'Brien was checking up the stuff as it was loaded into the cars and kept it in a book, a record of what was loaded. O'Brien was present and made notes of the goods as they were placed on the cars. Then we passed Bouse and all of the outfit that we loaded was left at A. & C. Junction except a carload of stock which was taken to Wickenburg.

I heard a conversation at A. & C. Junction between the Conductor and MacMahon. MacMahon asked him why he was leaving the cars there instead of taking them to Wickenburg and the Conduc-
57 tor said he would take them to Wickenburg but there was no room on the side track there for all the cars. Nothing else was said between them that I know of. After the cars were switched on the siding at A. & C. Junction I went on to Wickenburg with the rest of them.

No cross-examination.

E. J. DIGNAN, called as witness on behalf of plaintiff, being first duly sworn, testified as follows:

On direct examination (44):

My name is Edward James Dignan. On June 5th, 1907, I was Conductor on the Santa Fe, Prescott and Phœnix Railway. Previous to that I should judge that I had acted as Conductor for about three years. I am now a conductor for the defendant company. I was the Conductor that carried the outfit of Grant Brothers from a point about twelve miles west of Bouse into Bouse and from Bouse to the A. & C. Junction. There was a Station Agent at Bouse on June 5, 1907. Prior to the train leaving Bouse on its trip to Wickenburg I received a paper or document from the Station Agent which was a Clearance which we are required to get at all terminal points, showing that all trains due to leave have left before we can leave with a regular or any other train. I don't know what I did with this clearance paper. I gave one to the Engineer and kept one
58 myself. I suppose I left mine in one of the cars sticking in one of the pigeon holes.

Some way bills for merchandise were also given me. These way bills were for the merchandise car which is a kind of local car.

I also received the way bills for Grant Brothers goods, wares and merchandise. I left the dead freight and way bills therefor at A. & C. Junction. There was no Station here on June 5, 1907, but I left the way bills in the Register Box, which is a box with a Register Book in it for the main line trains to register in—all main line trains are supposed to stop there and register on account of having rights against those trains. I left the way bills for the dead freight in that box. I never saw them since I left them in that box. The Conductor that picks up the cars is supposed to get those way bills and in the regular course of business he would get them when he picked up the cars which were set out.

We left Boise as near as I can recollect about 5:55 or 6 o'clock and reached A. & C. Junction about 10:50 p. m. I set part of the train out at A. & C. Junction. (Here the witness draws a diagram of the tracks and A. & C. Junction and explains the same to the jury.) I don't think it is over fifteen feet from switch to switch between the point of contact of the A. & C. line and the main line of the Santa Fe, Prescott and Phœnix. I switched ten cars of my train on
59 the side track of the Santa Fe, Prescott and Phœnix at A. & C. Junction. There were about seven loaded and three empties as near as I can recollect. Six of them were loaded with Grant Brothers' outfit and one was loaded with ore. The car of ore was not shipped by Grant Brothers. It was a commercial car from Vicksburg.

After leaving all of the cars containing Grant Brothers outfit except the car of mules at A. & C. Junction, we went on towards Phœnix. We took four cars to Wickenburg. One of these cars consisted of merchandise, one was empty and the other two contained mules and horses.

We transported some men from A. & C. Junction to Wickenburg. They were all over the train as best they could accommodate themselves. We left A. & C. Junction for Wickenburg about 10:55. It took us about five minutes to do the switching.

When the cars were cut out there was nothing at A. & C. Junction except the station and the side track. My view was unobstructed there for four or five miles and there were no inhabitants living within that distance that I know of. There was no water or water tank there that I know of. There was a well about one hundred yards from the track but I never examined it and don't know whether there was any water in it or not. I left no person in charge of the cars that were left on the side track. No person was left there within my knowledge.

60 On cross-examination (62):

Yes, sir, these (referring to defendant's exhibits 1 to 6 inclusive), are the copies of the way bills handed to me by the Agent at Bouse at the time I left with plaintiff's camp equipment and grading outfit on June 5, 1907. I have my train book showing that the cars mentioned in those way bills were handled in Train No. 12 running between Bouse and the A. & C. Junction.

I can't say exactly how many of Grant Brothers' employees we brought in with the outfit but, approximately thirty-five or forty.

(Here defendant intoduced in evidence, as defendant's exhibits "1 to 6," inclusive, six (6) certain Bouse to Phœnix Waybills, numbered 23 to 28, inclusive, covering the movement of and intended to accompany the cars designated in such Waybills, each of which showed that the car named therein contained plaintiff's camp equipment and grading outfit and on each of which was endorsed the words "Loaded at A. & C. Front" and on the first four of such Waybills in the blank left for the insertion of the weight, were the figures "20,000," and in the blank left for the insertion of freight charges was the word "Free" and on those four were also endorsed the words, "Destroyed by fire at A. & C. Jct. 10 a. m. 6/6 H. W. McK." The other

two Waybills, numbers 27 and 28, were in all respects similar except that there was no endorsement thereon as to the destruction by
61 fire of the cars therein mentioned and that in the colum designated "weight" were inserted the figures "24,000" and in the column under the head "Authority" the figure- "59" and in the column under the head "Freight" were the figures "$7.08.")

On redirect examination (63):

The papers just introduced in evidence as "Defendant's Exhibits 1, 2, 3, 4, 5 and 6," respectively, are what are known among trainmen as waybills. The items indicated by the printed words "weigh this car at," underneath which is written the word "Phœnix," means that the car which the waybill accompanied and which is named in the waybill was to be weighed at Phœnix for the purpose of determining the freight bill, that is the weight on which to figure the freight charges. I don't know by whom those waybills were made out or who made any memorandum which appears on the waybill or who endorsed thereon the words "Destroyed by fire at A. & C. Jct. 10 a. m. 6/6, H. W. McK."

That thereupon defendant admitted in open court that on the morning of June 6, 1907, the cars numbered respectively SP 84487, SP80116, SP79084 and T&NO20320, referred to in waybills 23, 24, 25 and 26 (Defendant's Exhibits 1 to 4, inclusive), and the contents of such cars theretofore loaded by Grant Brothers with
62 its camp equipment and grading outfit were destroyed by fire while on a side track at A. & C. Junction where they had been set out by Conductor Dignan on June 5th, 1907.

JAMES CASHION, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

On direct examination:

My name is James A. Cashion and I am fifty years old. I am Vice-President and General Manager of Grant Brothers Construction Company and have occupied that position for about four years. I was with the predecessors of this corporation for a good many years prior to that time. On June 5th and 6th, 1907, I was in Phœnix, Arizona.

On June 6th, 1907, I received a telegram for Grant Brothers Construction Company from W. A. Drake, a high official of the Santa Fe, Prescott and Phœnix Railway Company notifying me that certain cars which contained equipment of the plaintiff had been destroyed by fire at A. & C. Junction. I immediately hunted up Mr. O'Brien who had the contents of each of the cars, in order to find out what was destroyed. Mr. O'Brien and I then found out what contents of these cars were destroyed. I immediately started to replace it by buying here in Phœnix. I never instructed Mr. O'Brien to go to the fire. D. R. McDonald, agent of the plaintiff and I visited the

fire about the 8th or 9th of June, 1907, and found most all of
63 the contents of the cars burned up. For the purpose of seeing whether or not any of the goods, wares and merchandise placed in the cars were of any value, I personally inspected the stuff which had been inspected and loaded on other cars by defendant's men there. I found some of the goods unconsumed and that portion of it was loaded on by defendant's men at A. & C. Junction and shipped to Phœnix. When the salvage arrived in Phœnix I had Mr. O'Brien go down and check it up and make an inventory of it.

On cross-examination (73):

The telegram which I received from Mr. Drake, of which I still retain a part, (which part was offered in evidence as "Plaintiff's Exhibit C"), was a statement to the effect that certain cars containing part of plaintiff's outfit "were destroyed at A. & C. Junction this morning," and then followed a list of the four cars. That was all the telegram amounted to.

W. A. DRAKE, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

On direct examination (74):

My name is W. A. Drake and on June 5, 1907, I think I was Chief Engineer and General Superintendent of defendant corporation.

On June 6, 1907, I transmitted to Grant Brothers Construction Company, or J. A. Cashion, a telegram (Plaintiff's Exhibit
64 C), stating that certain cars containing the plaintiff's camp and grading outfit had been destroyed by fire at A. & C. Junction.

JOSEPH REES, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

On direct examination (75):

My name is Joseph A. Rees and I am forty-nine years old. On June 6, 1907, I was a locomotive engineer in the employ of Santa Fe, Prescott and Phœnix Railway Company. On that date I passed a point known as the A. & C. Junction about 10:10 A. M. No. 2, a passenger train, had passed there that morning between four and five o'clock. No other train had passed there that morning to my knowledge. When I arrived there that morning four or five cars on the passing or side track were on fire. My train was going North and the side track was on my right. The cars were all aflame and there was a gale of wind blowing from the South toward the A. & C. Depot.

On cross-examination (77):

I was driving engine No. 55. Either engine No. 14, 15 or 16 was drawing train No. 2.

(Thereupon defendant attempted to prove by Witness Rees the manner in which the defendant's engines just referred to by the witness were equipped, to which testimony plaintiff offered an objection which was sustained by the Court as is shown by the following (77):

65 "Q. How are engines 14, 15 and 16 equipped?
"A. In what regard?
"Q. With respect to fuel burners."

By Mr. DOCKWEILER:

"We object to that question as not proper cross-examination."

By the COURT:

"I sustain the objection."

By Mr. BURKS:

"Q. Do you know whether or not all of the passenger engines operated on the line of defendant's railway are equipped with oil burners?
"A. They are."

By Mr. DOCKWEILER:

"We object to the question and ask that the answer be stricken out."

By the COURT:

"Strike it out. The objection is sustained."

(Argument.)

By the COURT:

"Step aside Mr. Witness."

Thereupon it was stipulated that the feature of the case as to the value of the goods destroyed by fire might await the presentation by defendant of a motion for a directed verdict, and that, if such motion should be denied, then such testimony as to value should be presented as a part of plaintiff's main case (78).
Thereupon defendant presented to the Court the following:

66 *Motion to Instruct Jury to Return a Verdict for the Defendant for the Reasons and upon the Grounds Following.*

First. That it affirmatively appears from plaintiff's complaint that the property of plaintiff described in its complaint was being transported by the defendant under, by virtue of and pursuant to the terms of the special written agreement for the construction of a railway set out in said complaint.
Second. That is appears from plaintiff's complaint that by the terms of said construction contract set out in said complaint, plaintiff expressly agreed with defendant as follows:

"All movements of goods at less han tariff rates to be at consignee's risk of loss and damage."

Third. That it affirmatively appears from plaintiff's complaint that plaintiff was the consignee of its goods which were being transported by defendant and that such goods were being moved at less than defendant's published tariff rates pursuant to the terms of said construction contract "at consignee's risk of loss and damage."

Fourth. That it affirmatively appears from plaintiff's complaint that, with respect to the transportation by defendant of plaintiff's camp equipment and grading outfit, this defendant was
67 not acting as a common carrier, but that defendant was a private carrier or ordinary bailee.

Fifth. That it appears from plaintiff's complaint that defendant observed the same care and diligence with respect to plaintiff's property which defendant was transporting as defendant observed with respect to its own property of like value and nature, namely, its cars in which plaintiff's property was being transported.

Sixth. That it does not appear from the pleadings in this case that defendant failed or neglected to perform any duty which it owed to plaintiff with respect to the transportation of plaintiff's property, or otherwise, or that defendant failed to perform any obligation imposed upon it by the terms of said construction contract, or otherwise.

Whereupon the foregoing motion was fully argued and was, by the Court, overruled and denied, to which ruling defendant duly excepted (87).

Thereupon the defendant made the following:

Motion (88).

"By Mr. VAN COTT:

"The defendant moves at this time for a verdict on the separate and specific ground that by the terms of the contract, even assuming that your Honor is correct that the status of the carrier was not changed, still, by the terms of the contract the defendant is relieved from liability from any loss or damage not occasioned by its
68 negligence, and that the burden is upon the plaintiff under such circumstances to show affirmatively negligence on the part of the defendant which was the proximate cause of the loss in this case and that plaintiff, as a matter of law, has not shown by competent testimony any such negligence."

Thereupon the motion last quoted was, by the Court, overruled and denied, to which ruling defendant duly excepted (88).

Whereupon defendant presented to the Court the following:

Motion (88).

"By Mr. Burks:

"Defendant desires at this time to move to strike from the Record "Plaintiff's Exhibit B" for the reason and upon the ground that it appears that said exhibit purports to contain a list of items which were loaded and the testimony shows that the list was made up at Phœnix several days after the fire which destroyed such goods, and furthermore that such list was made up from hearsay or secondary data and was not all made by any one person and does not contain a correct statement so far as any one person can tell as to what the contents were that were loaded."

Whereupon said motion was argued and was, by the Court, overruled and denied, to which ruling defendant duly excepted.

69 JAMES A. BURTON, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

On direct examination (90):

My name is James A. Burton and I am forty-one years old. I am now and since its organization in September, 1903, have been Secretary of plaintiff corporation which succeeded the co-partnership of Grant Brothers. I have been connected with Grant Brothers Construction Company for about twenty years, in clerical work and as purchasing agent. I have operated with them in California, Colorado, Arizona and Oklahoma. At present we are and for about three years have been engaged in contracting for the Southern Pacific between Guadalajara and Guaymus. We employ about 4000 men daily and about 2500 or 3000 head of stock. During the last three years I have had supervision of the purchasing of camp and grading outfits, paraphernalia and implements connected with plaintiff's work.

I have read the list of articles contained in "Plaintiff's Exhibit B." I first saw that document sometime in June, 1907. I should say I saw it ten or twelve days after June 7, or 8, 1907, when I examined it item by item to see what had been destroyed and then had a bill of the contents made, the cost values and so on, for the purpose of presenting it to the railway company, which I did. I presented a bill made up from this list on one of our bill heads. It was a
70 general bill—defendant indebted to plaintiff in such and such an amount, each item was set out in the bill item for item at the cost prices to us and in cases where it was outfitting we deducted a percentage for wear and tear to get at the value or cost of those articles at that time.

One June 5th and 6th, 1907, I was familiar with the market value of the goods, wares and merchandise set out in "Plaintiff's Exhibit B." The market value at A. & C. Junction on that date was $9061.00 and odd cents.

No Cross-Examination.

Thereupon plaintiff rested.

By stipulation of counsel, the Court ordered that all motions for a directed verdict previously made by defendant should be considered as having been made again at the close of plaintiff's whole case and again denied (97).

Defendant's Case (97).

Thereupon defendant's case was stated to the jury and testimony was introduced by the defendant as follows:

W. A. DRAKE was called as a witness for defendant and testified as follows:

On direct examination (98):

My name is W. A. Drake and I reside in Prescott. I am now General Manager of the Santa Fe, Prescott and Phœnix Railway and other lines connected with it. I have been engaged both
71 in surface construction, maintenance and operation of railways for more than thirty years. In December, 1904, I was Chief Engineer and in addition to that was General Superintendent or Assistant General Manager, I don't know which. At that time we contemplated the construction of a road from the Arizona and California Junction near Wickenburg to Bengal, California, by way of Bouse, what is now Bouse and Parker. During that month I issued and mailed to various contractors, including plaintiff, an invitation for bids for the construction of about forty (40) miles of that road. This is a copy of the letter that I mailed. (Here the copy of the letter referred to is introduced in evidence and marked "Defendant's Exhibit 7.") (100.)

"DEFENDANT'S EXHIBIT 7."

Santa Fe, Prescott & Phœnix Railway Company.

File—Bids.

PRESCOTT, ARIZONA, *Nov.* 23, 1904.

DEAR SIRS: Proposals will be received until noon of December 5th, 1904, at the office of the Chief Engineer, at Prescott, Arizona, for the grading of the roadbed ready for ties, clearing right-of-way, making necessary canals, etc. of the Arizona & California Railway, from mile number eight, more or less, westward a distance of about forty (40) miles.

72 A profile may be seen at the office of the Chief Engineer at Prescott, and other information will be given.

The work will be performed in accordance with the specifications of the S. F. P. & P. Ry. Co., and contract will be written on that Company's form.

The Railway Company hopes to keep the end of the track within four miles of the nearest grading camp.

It is expected that maximum time allowed for this construction will be between two and three months.

Water will be delivered in cars at end of track at the rate of one dollar and fifty cents (1.50) per 1000 gallons, and supplies will be hauled to end of track both in the usual manner of construction trains, subject to delays, etc., incident thereto.

All risk of loss and damage to be borne by the Contractor.

The Railway Company will furnish a rate of one cent per ton mile from all points on the S. F. P. & P. Road and leased road for the Contractor, on camp and grading outfit and supplies, corral supplies, etc., except explosives and commissary goods, and return to original shipping point at same rates, on completion of the work. All movements of goods at less than tariff rates to be at consignee's risk of loss and damage.

The Company will also furnish the Contractor's employees
73 to end of track from points on the S. F. P. & P. and leased lines, a rate of one cent per passenger mile and return those who have worked until the completion of contract at the same rate.

Passengers carried at less than passenger rates will be required to assume all risks of accident to person and baggage. The plan of movement of these employés and freight is to be according to rules of the General Freight and Passenger Agent.

The Company will also secure for the Contractor similar rates over the Santa Fe Company's Coast Lines, on camp and grading outfit in carload lots, both to and from the work, and for workmen going to the work in lots of five (5) or more. * * *

Yours truly,
(Signed) W. A. DRAKE.

(Endorsed: Filed May 7, 1909.)

In response to that call for bids I received a bid from Grant Brothers Construction Company. The letter asking for bids went out over my signature with ink notations on it besides the typewriting and I received a reply from plaintiff dated December 6th, 1904. I have had lots of correspondence with J. R. Grant and am reasonably familiar with his signature. (Thereupon the letter referred to is introduced in evidence and marked "Defendant's Exhibit 8.")

74 "DEFENDANT'S EXHIBIT 8."

Grant Brothers Construction Company, Railroad Contractors.

LOS ANGELES, CAL., *Dec. 6th*, 1904.

Mr. W. A. Drake, Chief Engineer, S. F. P. & P. Ry., Prescott, Arizona.

DEAR SIR: We hereby submit bid for grading the Arizona & California Railway from mile No. 8, more or less westward, a dis-

tance of 40 miles as per your letter of Nov. 23rd, 1904. * * * (Prices named in bid omitted.) * * *

Yours respectfully,

JOHN R. GRANT,
Vice-President.
JOHN A BURTON,
Secretary.

(Endorsed: Filed May 7th, 1909.)

I have read the contract of December 12, 1904, referred to in plaintiff's complaint and that contract was the result of my call for bids and the bid was made by plaintiff. That contract was made for the grading of the west end to mile 46 in the County of Yavapai. Under amended conditions its operation was extended to apply to the construction of the Arizona and California Railway.

That is the letter extending the operation of the contract and
75 and it has J. R. Grant's signature to it.

(Thereupon the original letter just referred to was introduced in evidence and marked "Defendant's Exhibit 9" but as it is the same letter set out in paragraph four of the second defense in Defendant's Amended Answer we will for the sake of brevity quote only the words following):

DEFENDANT'S EXHIBIT 9.

"That the Company shall assume no obligation or risk in case of accident to men and supplies, it being understood that these provisions and conditions shall become effective on the first day of December, 1905, and thereafter.

"Your acceptance written across the face of this letter and signed by your Company will provide for the continuance of the work in accordance therewith.

Yours truly,

W. A. DRAKE.

DLCC, J. A. Cashion, Phœnix.

"The foregoing terms and conditions accepted by Grant Brothers Construction Company, by J. R. Grant, President."

In making contracts with Construction Companies it is usual and customary for Railway Companies to give to the companies doing the construction work a rate less than that which is accorded to the general public. A rate of one cent per ton per mile is very much
76 less than the general public was charged for the transportation of commodities over the railroad line at that time. I couldn't say exactly how much less but it was probably a great deal less than was at that time charged by the defendant for the transportation over its lines of goods of the same character shipped by the public generally. I am familiar with the practice existing between railroad companies and construction companies. When the contractor wishes to move his goods over the railroad he asks the trainmaster, or whoever is most available, to furnish him cars for loading

his goods. He loads the goods himself and gives the agent, or the nearest man available in the employ of the railway company, a list of the cars, giving the car numbers and classifying them as grading outfit and asks that it be moved to whatever place he desires. Sometimes he puts his own men on it and sometimes I presume he does not—ordinarily there is a request for the movement of men with the movement of the goods.

On or about June 4, 1907, defendant received a message from J. A. Cashion, presumably for the use of Grant Brothers, for the use of cars for loading their outfit. Yes, that "Defendant's Exhibit 10" is the original message signed by Grant Brothers instead of Mr. Cashion. We had already received some cars from the Southern Pacific Company for loading this outfit and they were ordered placed for
77 loading by plaintiff. Then the Conductors at the front were ordered to go to the front beyond the last station of the operated line and get the cars that had been loaded. On the date that request was made we were operating regularly only to a point called Bouse. On June 5th, 1907, the line was being constructed and was not regularly operated west of Bouse, beyond which place there was no regular station for transacting business for the public.

(Here a telegram was shown to witness, marked for identification and later introduced as "Defendant's Exhibit 10," which reads as follows:)

"DEFENDANT'S EXHIBIT 10."

BOUSE, 6-4-07.

"H. C. S. (meaning H. C. Storey, defendant's Superintendent):

Outfit will be loaded tomorrow at 10 a. m. Can you arrange to have our cars taken to Bouse to connect with number twelve tomorrow?

"(Signed) GRANT BROTHERS."

(Endorsed: Filed May 7, 1909.)

It would be my belief that plaintiff's camp equipment and grading outfit was loaded and the cars picked up about twenty miles beyond Bouse, at mile post 100. There was no regular station at the place where the cars were picked up. The cars were pushed as far towards the end of the track as was possible because the roads leading to
78 plaintiff's camp were very, very heavy with sand, and the handling of them at that point, which was not a regular stopping point, was solely pursuant to the request of plaintiff.

In all my experience in railroading, extending over thirty years, I have never known of a case where railway watchmen were placed to guard and watch cars containing construction equipment which happened to be placed at non-agency stations.

Prior to making this contract I had about twenty-five years' experience in making construction contracts of this kind and operations thereunder. During all this time the general practice relating to hauling such outfits on regular trains after they had been received at those out-of-the-way stations known as "the front" is that they were

ordinarily hauled by the first work train to within the limits of the nearest operating train to move it to the point requested. Ordinarily the operation of a new line is covered by a schedule of trains to some point reasonably as near the front as can consistently be operated, and from that point forward the work trains handle the traffic. On June 5th, 1907, there was a mixed train—that is a train carrying some freight and some passengers—operating on the regular schedule of the Santa Fe, Prescott and Phœnix Railway as near the front as could be consistently operated known as No. 12, and it was this train that plaintiff requested its outfit to be attached.

79 I heard Conductor Dignan's testimony yesterday. From my long experience as a railroad man I know that under ordinary conditions all other traffic has preference over these outfits. There were no extraordinary conditions with respect to the movement of plaintiff's outfit which would make the general rule non-applicable. With respect to the handling of plaintiff's goods we followed the general practice which I knew to have existed all over the country for many years and to be at that time and we never have, and it is not customary to place watchmen to guard cars which are set out at such stations as A. & C. Junction.

The cars containing this outfit were not part of the rolling stock of this defendant. They belonged to the Southern Pacific Railway Company or some of its auxiliary companies and were procured by special request of plaintiff to my office for the purpose of transporting plaintiff's outfit under their contract with the defendant.

On cross-examination (116):

Ordinarily cars are not exchanged between the Southern Pacific Railway Company and the Santa Fe Company at Phœnix. We knew these goods were to be moved over the Southern Pacific Line and therefore the Contractor asked that those cars be furnished so the goods would not have to be transferred into other cars at Phœnix.

80 I have been acting as an official of the defendant corporation exclusively for fourteen years last past. I have ridden over roads and know in a general way what is being done. I have been familiar with other contractors as well as those on our line. I have personally witnessed other construction trains hauled on other lines on behalf of other contractors and it has never been the practice to guard such trains left upon isolated spots upon the desert.

I had general charge of the defendant corporation's rolling stock on June 5th and 6th, 1907.

That telegram (referring to Defendant's Exhibit 10) was addressed apparently by Grant Brothers to Storey, who is Superintendent of defendant corporation. (118).

Pursuant to the request contained in that orders were given for the purpose of carrying out plaintiff's request by a certain telegram. (Thereupon a telegram containing directions for the movement of plaintiff's outfit was introduced in evidence and which reads as follows:)

DEFENDANT'S EXHIBIT II."

PRESCOTT, 6-4-'07.

Grant Bros. and Con. Miskell, A. & C. Front, Cond. Dignan, Wickenburg:

Dignan go to A. & C. Front tomorrow and get Grant Brothers' outfit. Miskell and Dignan look out for each other.

(Signed) H. W. McK.

81 ALBERT DUFFIELD, called and sworn as a witness for defendant testified as follows:

On direct examination (119):

My name is Albert Duffield. I have been in the railway business for sixteen years. During that time I have worked for various railroads and have been employed as operator, agent, brakeman, conductor, dispatcher and trainmaster and other minor positions that I do not recall now. I am now trainmaster for the Atchison, Topeka and Santa Fe Railway Company, Coast Lines.

During my experience in railroading I have become familiar with the practice regarding the transportation of camp and grading outfits for contractors, and more especially as pertains to the operating part of the business.

During my fifteen years' experience in railroading I have observed that the practice of well operated railroads is to give preference to the general traffic over camp and grading outfits, especially so where the outfit is being returned and is not needed any more, all other branches of traffic were given preference over it.

During my experience in railroading it has been the general practice to set out cars containing contractors' camp equipment and grading outfits on side tracks at non-agency stations, especially when the occasion demands it. Where there is a side track or non-agency station it is put there for the purpose of setting out cars. The
82 general practice is to set out such cars containing contractors' camp equipment and grading outfits without guards to watch them. During my experience I have never known of guards being placed over such cars—it is preposterous—I never heard of it. With reference to the cars set out at a non-agency station in an open desert it is not the custom to place guards over them.

On cross-examination (124):

H. W. McKean was Trainmaster for defendant corporation at the time these cars containing plaintiff's outfit were destroyed by fire. He is still with the corporation. On June 6, 1907, I was Trainmaster on the Third District of the Albuquerque Division of the Coast Lines of the Santa Fe proper, a separate corporation from defendant as far as I know.

It is customary for railroads to side track on an open desert, miles from any habitation, without any water available to extinguish a fire,

goods, wares and merchandise shipped over the road and without placing a guard over them.

If we could determine beforehand the act of God we might put such a guard over them but this we cannot provide against. I do not think that a guard is necessary to protect the cars against burglary, persons inimical to the railroads or others and to place such guards is not the general practice. It has never been the custom to
83 set guards over cars which were set out on side tracks under similar conditions as the cars containing plaintiff's outfit were set out at A. & C. Junction. I have had experience in many instances of this kind. (Here witness details some of his experiences with respect to the movement of grading outfits, which are omitted for the sake of brevity.)

I have been at A. & C. Junction which is a little less than four miles from Wickenburg, and there is water at Wickenburg. (133). (Witness is further cross-examined with respect to his personad experience in the handling of grading outfits.)

After outfits like plaintiff's have been loaded, it is customery to have them moved by the less important trains, which are usually the ones designated to handle them.

GEORGE TISDALE, called and sworn, testified as follows:

On direct examination (138):

My name is George Tisdale and I have had experience in handling camp equipment and grading outfits and am familiar with the articles generally used in construction camps, and their value. My experience in this line extends over twenty-four years. I was familiar in a general way, from visiting their camps, with the camp equipment and grading outfit of plaintiff. I have carefully examined the list of items set out in the list marked "Plaintiff's
84 Exhibit B," have gone over it carefully, item by item and figuring those items marked "new" and such stuff as steel and iron that I knew were as good as new, and making proper deductions for second hand goods, I figure and estimate that the outfit destroyed was worth about $5400.00.

On cross-examination (139):

At present my occupation is Superintendent of Bridges and Buildings for defendant. I have been employed by defendant for a little over fourteen years.

(Cross-examination of witness as to his estimate of the value of the various items in "Plaintiff's Exhibit B" and as to his method of arriving at the estimate of the total value is omitted for the sake of brevity.)

G. G. WATSON, called and sworn as a witness on behalf of defendant, testified as follows:

On direct examination (179):

My name is G. G. Watson and I reside in Los Angeles. I am an engineer and have been practicing my profession for five years, during which time I have been in and around construction camps a good deal. Part of my duties consisted of ascertaining the value of camp and grading outfits. I have examined the list marked "Plaintiff's Exhibit B," and in my opinion the market value in Phœnix in 1907 of the items therein was, approximately $5100.00.

85 On cross-examination (180):

I am twenty-nine years old and have been engaged in railroad and electrical engineering and construction work. I am a graduate of the University of California, class of 1904. (Further examination of this witness is omitted, for the sake of brevity, inasmuch as it merely shows a somewhat limited experience and that his estimate and the method of arriving thereat was of uncertain value.)

E. DE SILVA, called and sworn on behalf of defendant, testified as follows:

On direct examination (208):

I reside in Prescott, Arizona, and am Master Mechanic in the employ of the defendant and have occupied that position since April 1, 1902. The general nature of my duties as such Master Mechanic is to look after the locomotives and motive power and equipment belonging to the defendant. I have been railroading since 1885, twenty-four years.

All of the passenger and freight locomotives of the defendant which pass A. & C. Junction are equipped with oil-fuel, oil-burners. Locomotives burning oil such as are used by the Santa Fe, Prescott and Phœnix Railway Company will not throw sparks, because the oil is atomized in the fire box and the flame is all consumed in the fire box, allowing nothing but gases to escape. All solid ma-
86 terial in the oil is completely consumed in the fire box and nothing but gas and steam come out of the stack.

As all engines approach A. & C. Junction from the south they shut off the steam at the south switch of the passing track and run without steam or "drift" up to the station, and all engines which approach from the north use the steam until about one hundred feet north of the station, then stop at the depot and "drift" on to Wickenburg. The train testified to as passing this siding about four o'clock in the morning the cars were burned would not be under steam but would "drift" down without any blast through the stack and therefore there would be nothing to carry any spark, even if there was any spark, out of the stack.

On cross-examination (210):

I was at A. & C. Junction immediately after the fire. I do operate engines nearly every time I come to Phœnix. If the engineer had turned on his steam and kept it on while passing this side track it would have been utterly impossible for any fire at all.

At times soot accumulates in the stack of engines burning oil, but it is burned out by means of steam and sand. No sparks ever come out during this operation. I have ridden from Phœnix to Prescott and have never seen a spark. It would be impossible for any fire to fall from the fire box of a moving engine. It might hap-
87 pen if the engine was standing and the fireman would neglect his firing valve, then there would just be oil drops and if there was any fire it would go out when it struck the road bed. There could be no inattention on the part of engine's crew which would cause fire to escape from the engine while in motion.

Thereupon Mr. Van Cott read to the jury the contract set out in plaintiff's complaint and the supplemental contract upon which defendant bases its defense.

That thereupon defendant presented the motions for a direct verdict theretofore made at the close of plaintiff's case, which motions were by the Court overruled and denied, to which ruling defendant excepted. (87-88.)

Thereupon said cause was argued to the jury by Counsel for the respective parties, after which the Court instructed the jury as follows:

Gentlemen of the Jury, this is a civil action brought by the plaintiff, Grant Brothers Construction Company, against the Santa Fe, Prescott and Phœnix Railway Company, to recover damages for the loss and destruction of a certain amount of goods belonging to the plaintiff company while in the custody of the railway company. The jury, gentlemen, in cases in which they participate, are the judges of the facts in the case. The Court has nothing to do with the facts; the facts are determined wholly by the jury. You
88 are the sole judges of the credibility to be attached to the witnesses—how much weight you will give to their testimony. The Court instructs you as to the law. You have heard, gentlemen, from all these eminent counsel that have addressed you statements as to what the law is and what the law is not. It is a presumption that the Court knows the law, but that presumption has never been extended to the Counsel in the case; you pay no attention, gentlemen, to what Counsel said with respect to the law. You will take the law from the Court. The province of the Counsel is to aid you in elucidating the facts in the case, and they should comment to you as they have done, on the facts and aid you to come to a determination of the facts of the case; but the law you are to take from the Court and not from the Counsel. Now, this case, with respect to the transaction and the details, is remarkably free from conflict in the evidence—there is no dispute about the transactions and the occurrences, practically, in the case. It is contended by both sides

that this plaintiff—this construction company—had some goods that were to be taken away by the railroad company from the scene of their operations; that they were loaded on to the cars brought there by the railroad company; that they were taken by the railroad company to a point known as the A. & C. Junction, and were
89 there sidetracked by the railroad company and left overnight; that the next morning the cars, or a certain number of the cars, were destroyed by fire, and the contents of those cars were destroyed, the contents being the property belonging to this construction company, and being their grading outfit. Now these facts, as I say, are conceded: there is nothing for you to decide there because both sides agree to it. The important question of fact for you to determine in the case is whether or not this railroad company, in leaving these cars on that sidetrack, was guilty of what is known in law as negligence. Because, if they were guilty of negligence, as I shall define it to you, and these cars were destroyed by reason of their negligence, then they must respond in damages, and you must then go on and ascertain what the damages are; and the measure of the damages in the case is the value of the goods at the time and place of delivery,—in other words, the value of these goods in June, 1907, in Phœnix, Arizona. Now with respect to the value of the goods, you must not speculate upon the value; you must be satisfied by the evidence in the case of the value, and as I say the value is not what the goods might have been worth to this construction company in their own imagination at that time for their own purposes, but what the market value of the goods in the condition they were at the time was, and that you must arrive at from the testimony
90 in the case, if you come to that question in the case at all. In no event, gentlemen, should you find for more than nine thousand, sixty-one dollars which is the largest amount sued for in the complaint in this case. Now gentlemen, the first question for you to determine in this case before you get to the question of damages at all, is the question of negligence, because in this case the Court leaves it to the jury to determine as a question of fact whether or not this railroad company was guilty of negligence in leaving the cars at this place, and then if it was so guilty of negligence, was that negligence the cause—the proximate cause—of this loss of goods. Now that question, which is the vital question in the case, the Court leaves to the jury to determine as a question of fact. Now in determining that question of fact, you should apply the law in the case as I now give it to you. Ordinarily when a man goes to a railroad company to ship goods and the railroad receives the goods, the railroad company is bound to deliver those goods to the place of destination or to account to the shipper for the value of them. And the railroad company can interpose no excuse because there may have been an accident or fire or anything else to cause the loss of the goods. The railroad company in an instance of that kind is what is known as an insurer; that is, the railroad company insures to the shipper the value of the goods and if the rail-
91 road company does not give the goods back the railroad company is to give the value of the goods. Now, that rule of law

does not apply in this case for this reason. In this case this construction company and the railroad company had entered into a contract and the contract provided with respect to the movement of the goods of the construction company that all movements of goods at less than tariff rates were to be at consignees' risk of loss or damage, and the contract in this case provided that the goods should be moved at less than tariff rates—the consignee in this case meant Grant Brothers Construction Company. So, by this contract under which this work was done it was provided that any risk or loss and damage to the goods should be that of Grant Brothers Construction Company—they should bear any loss or damage. There was supplemental contract entered into extending this work further on, and that contract contained this clause: The Company—that is the railroad company—"shall assume no obligation or risk in case of accident or damage to men and supplies." Therefore, by these two contracts Grant Brothers stipulated that if there was any loss to their goods when they were moved by the railroad company, Grant Brothers should bear that loss. Now the law does not allow a railroad company to take advantage of a stipulation of this kind to the full extent. By this contract the railroad company was not
92 freed from any liability for loss if that loss was brought about by the railroad company's negligence, but it would be freed from liability for any other cause of loss. Therefore, the vital question in this case is to determine whether these goods were lost or destroyed by reason of the neglect of the railroad company. Because if they were not, Grant Brothers have to stand the loss. If they were lost through the railroad company's negligence, then the railroad company must stand it. Now the question of whether the goods were lost through the railroad company's negligence or not is one of fact for you to determine, and the burden of proving it is upon Grant Brothers Construction Company, the plaintiff in this case. They must satisfy you by a preponderance of the evidence that this loss of these goods was brought about by negligence of the railroad company; if you are satisfied by a preponderance of the evidence that the loss was caused by negligence of the railroad company, then you ought to award damages for the value of the goods; if you are not so satisfied by a preponderance of the evidence that the loss was caused by the negligence of the railroad company, then you ought not to award any damages at all, and you should, in that event, find for the defendant. Now the actual way in which this fire occurred is not shown by the testimony. The vital thing
93 for you to determine is whether it was negligence on the part of the railroad company to leave the cars on this sidetrack in the way they did under the circumstances in this particular case. If it was negligence for them to so leave them, then the railroad company is liable. Now negligence, gentlemen, for the purpose of this case, is defined to be as follows: It is the omission to do something which a reasonable and prudent man guided by those considerations which ordinarily regulate the conduct of his affairs, would do. Or it is the doing something which a reasonable and prudent man would not do under all the circumstances surounding and character-

izing the particular case. And the jury in this case, taking this as the definition of negligence, is to find from the facts surrounding the transaction in question, whether or not the defendant company has committed negligence; and if they so find and further find that such negligence was the proximate cause of the destruction of plaintiff's property by fire, then the verdict should be for the plaintiff. The proximate cause of the injury may in general be said to be that act which immediately caused the injury—it need not be the sole cause; it is enough if it is the efficient cause and the one which sets the other causes in operation. So that, in this case, if you believe from the evidence that the defendant was guilty of negligence, or of any want of ordinary care or caution as I have defined it to
94 you and if the loss complained of resulted therefrom without any fault on the part of the plaintiff, the plaintiff has a right to recover in this case. If you believe from the evidence that the property in question was destroyed by fire and that by the exercise of ordinary prudence on the part of the defendant or its servants under all the circumstances of the case such destruction might have been prevented, then the defendant is liable herein. On the contrary, gentlemen, if you do not believe from the evidence, that such is a fact, then you should find for the defendant. Now this is the vital issue in this case—this question of whether or not this act of the railroad company in leaving the cars on that side track under the circumstances in this case, was, or was not, negligence, and if it was negligence, did that negligence cause the fire. If you find that to be so by a preponderance of the evidence—and as I have told you it is for the plaintiff to establish that by a preponderance of the evidence and if the plaintiff does not so satisfy you, you should return a verdict for the defendant—if they do so satisfy you, gentlemen, you should find a verdict for the value of the goods. But if you are not satisfied in the first instance that this is a negligent act on the part of the railroad company, you should find for the defendant. So gentlemen, you see after all it is a simple question for you to determine, for the circumstances surrounding this are practically
95 admitted, and the one vital question for you to determine is, was the one act of the railroad company in leaving the cars on the side track under the circumstances of the case negligent or was it not. If so, the plaintiff should have damages, if not the railroad company should have your verdict. Acording as you find you will have the verdict signed by your foreman and if you find damages for the plaintiff you fill in the amount. Swear the bailiffs."

Defendant's Instructions Refused.

That before the Court instructed the Jury defendant requested the Court to give to the Jury four certain instructions (Numbered I, II, IV and V) which the Court refused to give and duly marked "refused" and which are as follows:

I. The Court instructs you to return a verdict for the Defendant.

II. The Court instructs you that the plaintiff has failed to show

that the defendant was guilty of any negligence in transporting and handling the property of plaintiff and that your verdict should be for the Defendant.

IV. The Court instructs you that the effect of the covenant in the construction contract whereby the Construction Company agreed that, "all movements of goods at less than tariff rates to be at consignee's risk of loss or damage" was to relieve the railway
96 company for any liability for such loss or damage except when such loss or damage resulted from gross negligence on the part of the railway company or its employees.

V. The Court instructs you that it was not negligence on the part of the Railway Company to leave the cars containing the camp equipment and grading outfit of the construction company upon the side track at A. & C. Junction without stationing a man at such side track to watch and guard such cars.

That thereafter on the 29th day of May, 1909, defendant's motion for a new trial was argued, submitted to the Court and by the Court overruled and denied. Whereupon and on said day last named defendant duly excepted to the order of said Court overruling and denying its said motion and in open Court gave notice of appeal to the Supreme Court of the Territory of Arizona from said order and from the judgment theretofore entered herein and from the whole thereof.

That thereafter, on the 22nd day of June, 1909, it was stipulated that defendant shall have until October 1st, 1909, in which to file in the office of the Clerk of the above Court a Transcript of the Reporter's Notes or a Statement of Facts as required by Subdivision 3 of Section 15, Chapter 74 of the Laws of 1907, with like force and effect as though filed within sixty (60) days from the entry of judgment or the order overruling defendant's motion for a new trial in the above entitled cause.

97 That thereafter, on July 17th, 1909, defendant filed herein its Supersedeas Bond in the form prescribed by law, together with its Bond on Appeal, a full, true and correct copy whereof certified to by the Clerk of the above Court is hereinafter set forth.

Respectfully submitted,

PAUL BURKS,
L. H. CHALMERS,
A. H. VAN COTT,
Attorneys for Appellant.

98 And on to-wit: the tenth day of January, 1910, being one of the regular juridical days of the January term of said court, 1910, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

At this day, on Motion of Mr. L. H. Chalmers for appellant, it is ordered by the Court that oral argument be granted in this cause, and the hearing set for January 21st, 1910.

And on to-wit: the twenty-first day of January, 1910, being one of the regular juridical days of the January term of said court, 1910, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

At this day, on motion of Mr. A. C. Baker, attorney for appellee herein, it is ordered by the Court that Mr. Isidore B. Dockweiler be admitted for the purpose of argument in this cause on behalf of appellee.

It is further ordered, on motion of Mr. Paul Burks attorney for appellant herein, that Mr. A. H. Van Cott be admitted for the purpose of argument on behalf of appellant.

99 And on the same day to-wit: the twenty-first day of January, 1910, being one of the regular juridical days of the January term of said court, 1910, the following other order was had and entered of record in said cause in words and figures following, to-wit:

Title of Cause.

This cause coming on at this time for hearing was argued by Mr. Paul Burks and Mr. A. H. Van Cott for appellant and Mr. I. B. Dockweiler for appellee, and cause ordered submitted.

And on to-wit: the second day of April, 1910, there was filed in the clerk's office of said court in said entitled cause a certain Opinion in words and figures following, to-wit:

100 In the Supreme Court of the Territory of Arizona.

No. 1136.

SANTA FE, PRESCOTT AND PHŒNIX RAILWAY COMPANY, a Corporation, Appellant,

v.

GRANT BROTHERS CONSTRUCTION COMPANY, a Corporation, Appellee.

Appeal from the District Court of Maricopa County.

Before Hon. Edward Kent, Judge.

Paul Burks, A. H. Van Cott, and L. H. Chalmers, For Appellant.
A. C. Baker, and Isadore B. Dockweiler, For Appellee.

Opinion by Doan, J.

This is an appeal from a judgment for $9,061.00 rendered by the district court of Maricopa County as damages for the loss by fire of the property of the appellee while in transit on the road of the appellant company.

The facts in the case appear to be that prior to June 5th, 1907, the construction company had been engaged in grading a railroad for the appellant; the contract under which this road was constructed (composed of 18 sub heads or paragraphs) contained among other conditions and provisions the following, to-wit:

101 "14. Water will be delivered in cars at the end of the track at the rate of one dollar and fifty cents ($1.50) per 1000 gallons, and supplies will be hauled to end of track, both in the usual manner of construction trains, subject to delays, etc. incident thereto. All risk of loss or damage to be borne by the contractor.

15. The company will furnish a rate of one cent per ton mile from all points on the S. F. P. & P. Road, and leased roads to the contractor on camp and grading outfit and supplies, etc. except explosives and commissary goods, and return to original shipping point at same rate on completion of the work. All movements of goods at less than tariff rates to be at consignee's risk of loss and damage.

16. The company will also furnish the contractor's employees * * * a rate of one cent per passenger mile * * * and return those who have worked until completion of contract at the same rate. Passengers carried at less than tariff rates will be required to assume all risk of accidents to person and baggage. The plan of movement of these employees and freight is to be according to the rule of the general freight and passenger agent."

This contract was based upon a proposal for bids made by the appellant under which the appellee was the accepted bidder. The proposal contained the stipulations as they appear in the above quotation from the contract.

On June 5th, 1907, upon the completion of the construction of the road bed, the appellants, at the request of the appellee, placed certain cars at the end of the track some twelve miles west of Bouse (the last regular station west on the A. & C. Road) and appellee loaded thereon its camp and grading outfit, and several of its workmen, and the cars were hauled by appellant to Bouse; the appellee unloaded a quantity of powder and hay, and purchased transportation for the workmen; the said cars and contents were way billed to Phœnix, Arizona, and the cars were then and there cut

102 into and became a part of appellant's regular freight train No. 12.

Appellant's freight train No. 12 then proceeded from Bouse towards Phœnix, via Wickenburg. About eleven o'clock on the night of June 5th, 1907, at a point between Bouse and Wickenburg known as the A. & C. junction, the conductor in charge of train No. 12, cut out therefrom ten cars, and left them upon a side track Six of these cars were loaded with the outfit of the appellee; one was a commercial car of ore, and three were empty cars. Train No. 12 then proceeded to Wickenburg with its remaining cars. These consisted of a combination or caboose car, two cars of live stock, being part of the shipment of appellee and one empty car.

On the morning of June 6th, 1907, four of the cars loaded with the grading outfit and other property of the appellee that had been left upon the side track were, with their contents, detroyed by fire.

There was no station agent of the appellant at the side track at the A. & C. junction where the fire occurred; no water tank nor any water supply there; no inhabitants there, and no one was left in charge to look after the cars thus side tracked by the appellant.

The appellee brought suit in the District Court of Maricopa County to recover for the loss of that portion of the camping outfit, and other property that was destroyed by the burning
103 of the cars and their contents.

The case was tried to a jury, and a verdict returned for $9,061.00 damages, and judgment rendered thereon. A motion for a new trial was denied. From the judgment and the denial of the motion for a new trial this appeal has been taken.

The appellant in support of its various assignments of error, has presented and urged five legal propositions.

1st. "That the contract for the movement of appellee's goods in connection with the construction by it of appellant's road, was valid, and it relieved appellant from liability for the loss of appellee's goods, no matter how caused."

Appellant contends that in handling appellee's goods under the contract, it acted as a private carrier, and if so, would have a right to protect itself by the exemption contained in the contract from liability, even if occasioned by its own negligence. This was the theory upon which the appellant tried the case in the lower court, while the theory on which the case was tried by the appellee was that the appellant acted as a common carrier, and would therefore, even under the terms of the contract, be liable for loss occasioned by its negligence.

It is conceded that a public carrier may, under some circumstances, act as a private carrier. A common carrier may become a private carrier when "as a matter of accommodation or special engagement he undertakes to carry something which it is not his business to carry".

104 Liverpool Steam Co. v. Phœnix Ins. Co. 129 U. S. 397.
L. N. A. & C. R. Co., v. Keefer, 38 L. R. A. 93.
Railroad Co. v. Lockwood, 17 Wall., 357.

4th Elliott on Railroads, page 11 states the rule; "Where there is a right to refuse to perform the services requested, there is a right to contract for their performance in a different capacity from that which rests upon a railroad company as a public or common carrier."

Mr. Hutchinson in his excellent work on Carriers, submits (1st Hutchinson, Section 48) as a test by which we can determine whether a party assumes the duties and responsibilities of a common carrier, five characteristics:

"1. He must be engaged in the business of carrying goods for others as a public employment, and must hold himself out as ready to engage in the transportation of goods for persons generally as a business, and not as a casual occupation.

2. He must undertake to carry goods of the kind to which his business is confined.

3. He must undertake to carry by the methods by which his business is conducted, and over his established roads.

4. The transportation must be for hire.

5. An action must lie against him if he refuses, without sufficient reason, to carry such goods for those who are willing to comply with his terms."

Applying these tests to the appellant in the case at bar, we find that:

1. It is engaged in the business of carrying goods for others as a public employment.

2. It undertakes, as a business, to carry goods of the kind now under consideration. The appellant's witnesses testified that the rate charged the appellee in the contract is less than tariff rates;
105 that one cent per ton mile was less than the established rate charged to the public. It was conceded that it had a rate for the carrying of this particular kind of goods, and that it held itself out as a common carrier thereof.

3. The appellant agreed to carry by its usual methods and over its established road the property, goods and commodities in question. The contract provides that "The company will furnish a rate of one cent per ton mile from all points on the S. F. P. & P. Road, and leased roads for contractors on camp and grading outfits and supplies, etc. except explosives and commissary goods, and return to original shipping point at same rates on completion of the work. All movements of goods at less than tariff rates to be at consignee's risk of loss and damage."

It has been urged in this connection that the cars were spotted by appellant, loaded by the appellee, and afterwards picked up by the appellant at the end of the track several miles west of Bouse, its last regular station, and that they were brought to Bouse for appellee's accommodation, and that such service could not have been compelled by the appellee. It is not necessary to determine the relation that existed between the parties, or where would have rested the liability for loss if any had occurred while the cars and goods were being brought from the end of the track to the station. The contract on which the appellant relies in this instance does not
106 provide for picking up the cars at the front, but only for returning to original shipping point on completion of work from all points on the S. F. P. & P. railway or leased roads. The word "points" would, by a fair construction, mean station or point where appellant was doing its regular business as a common carrier. The acts made obligatory on the appellee by the contract are to be considered in this connection rather than acts that may have been voluntarily performed by it. The test we are applying says: "when it undertakes to do, etc." The provision in paragraph 14 for hauling water and supplies to the end of track during construction does not provide for hauling camp and grading outfits, either to or from the end of the track, but seems to be a provision for hauling water and supplies during the course of construction, while the shipment of the camp and grading outfit after completion of the work appears to have been had under the provisions contained in paragraphs 15 and 16 of the contract. It would not be material whether the appellee had brought in its camp and grading outfit to the station at Bouse, and there shipped it to the point from which it had been

shipped in at commencement of work, or whether the cars being furnished at the front, the appellant had picked up these cars for it, and brought them into Bouse. Neither is it material whether in so doing the appellant acted as a private or common carrier; whether it was done for hire or gratis. The fact is established that at
107 Bouse, a point on the railroad operated by the appellant the camp and grading outfit was received. One provision of the contract excepts explosives and commissary goods. The record discloses that on arriving at Bouse, the party in charge of the outfit unloaded some powder and hay; purchased transportation from Bouse to Phœnix for the employees at the rate provided by the contract; the cars were way billed by appellant's agent (presumably at the rate of one cent per ton mile) and cut into and became a part of appellant's regular freight train No. 12, the plan of movement of which was admittedly according to the rules of the general freight and passenger agent of the appellant company.

4. The transportation must be for hire. This point is conceded as definitely established by the facts, as well as by the wording of the agreement.

5. An action must lie upon a carrier's refusal without sufficient reason, to carry such goods, if the party is willing to comply with its terms. When the freight and passengers in question were tendered to appellant at Bouse, from which point we have just stated the goods were waybilled by its agent, and transportation for the passengers was purchased from its agent, although at the reduced rates provided in the contract, there is no question but that a duty rested upon the appellant to transport the goods and employees at the rate named in the contract, and an action would lie for its refusal to do so.

108 The appellant, under the above rule, was a common carrier, and was, as such, transporting the goods at the time they were side tracked at the point where they were afterwards destroyed by fire.

It is conceded that a common carrier may, by an agreement to that effect, based upon proper consideration, limit its liability for loss of or damage to goods of a shipper, except such as may be caused by its own negligence. Adams Exp. Co. v. Carnahan, 94 Am. St. 279.

"When a carrier has a regularly established business for carrying all or certain articles, and especially if that carrier is a corporation created for the purpose of the carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, it is a common carrier, and a special contract about its responsibility does not divest it of that character."

Liverpool etc. St. Co. v. Phœnix Ins. Co. 129 U. S. 397.
Railroad Co. v. Lockwood, 17 Wall. 376.
Mears v. N. Y. N. H. & H. R. Co. 75 Conn. 171, 96 Am. St. Rep. 192.
Richmond v. Southern Pacific, 67 Pac. 947.

The foregoing principal is so well established by weight of authority that it is considered elementary in the law of carriers. Under this rule, the limitations in the contract will protect the appellant

against liability for any loss or damage, except that caused by its own negligence.

This leaves us to consider whether the loss in this instance was caused by the negligence of the appellant. The second proposition urged by the appellant is that "assuming for the sake of argu-
109 ment that the contract did not in law relieve the appellant from liability for the loss of the goods caused by its negligence, yet the burden was upon the appellee to show by a preponderance of evidence that some negligence of appellant was the proximate cause for the loss of the goods. This burden appellee totally failed to carry." It is conceded that the burden was upon the appellee to prove by a preponderance of the evidence that the loss was occasioned by the negligence of the appellant, and the court instructed the jury to that effect. Appellant states that the appellee totally failed to carry this burden. The question as to whether or not the appellee met this requirement was a question of fact for the jury. The learned court carefully instructed the jury on this point as follows:

"The vital question in this case is to determine whether these goods were lost or destroyed by reason of the neglect of the railroad company. Because if they were not, Grant Brother- have to stand the loss. If they were lost through the railroad company's negligence, then the railroad company must stand it. Now the question of whether the goods were lost through the railroad company's negligence or not is one of fact for you to determine, and the burden of proving it is upon the Grant Brother Construction Company, the plaintiff in this case. They must satisfy you by a preponderance of the evidence that this loss of these goods was brought about by negligence of the railroad company; if you are satisfied by a preponderance of the evidence that the loss was caused by negligence of the railroad company, then you ought to award the damages for the value of the goods; if you are not so satisfied by a preponderance of the evidence that the loss was caused by the negligence of the railroad company, then you should not award any damages at all, and you should in that event find for the defendant."

110 The court likewise defined negligence at considerable length, and then states:

"The jury in this case, taking this as a definition of negligence, is to find from the facts surrounding the transaction in question, whether or not the defendant company has committed negligence, and if they so find, and further find that such negligence was the proximate cause of the destruction of plaintiff's property by fire, then the verdict shall be for plaintiff."

The facts in the case are undisputed. There is no conflict in the testimony in regard to the facts and circumstances surrounding the shipment of the goods from Bouse, and the setting out on the side track at the C. & A. junction, of the cars and contents that were afterwards destroyed by fire, but the effect of these circumstances and facts in establishing negligence on the part of the appellant might be differently construed and considered by different conscientious intelligent men in determining the ultimate fact of negligence. For that reason, a submission of the question to the jury by the trial court

was eminently proper, and for that reason it cannot be said that the appellee failed to carry the burden of proof. The determination of this question disposes of the next proposition urged by the appellant, that the court erred in denying the appellant's motion for a directed verdict.

The fourth proposition urged is the error of the court in instructing the jury. An examination of the court's charge to the jury discloses no reversible error.

The last proposition urged is the error of the court in
111 denying the motion to set aside the verdict and grant a new trial. In support of this no argument is offered, and it may be disposed of by saying that if the question of negligence was one of fact for the jury, and there was evidence in the record to sustain their verdict, the denial by the trial court of the motion to set aside the same was fully sustained by the record.

The appellant, although it based its first legal proposition upon the statement that "The contract for the movement of supplies and goods in connection with the construction of appellant's road, was valid" has in the latter part of its brief urged that such contract would, by offering a different rate than that offered to the public generally, be invalid by reason of coming within the inhibition of the Interstate Commerce Law. In reply to this it may be said that this was not a private contract personal to Grant Brothers as a corporation, but was included in the appellant's proposal for bids, the benefit of which would accrue to any one who would be the successful bidder. The right, however, of a railroad, as a common carrier, to grant such terms was recognized by the Interstate Commerce Commission as quoted by appellant on pages 73 and 74 of its brief:

"On October 12th, 1906, the Commission announced an administrative ruling as follows: 'Issuance and use of free passes. * * * But the Commission does not construe the law as preventing a carrier from giving * * * Nor does the Commission construe the law as preventing a carrier from giving free or reduced rate carriage over its line to contractors for materials, supplies and men for
112 use in construction, improvement or renewal work on the line of that carrier; provided such arrangements for such free or reduced rate carriage are made a part of the specifications upon which which the contract was based, and of the contract itself.

The arrangements for reduced rate carriage of men, material and supplies were, in the case at bar, made a part of the specifications on which the contract was based, and of the contract itself.

The record discloses no reversible error, and the judgment of the lower court is therefore affirmed.

FLETCHER M. DOAN,
Associate Justice.

We concur:
ERNEST W. LEWIS,
Associate Justice.
EDWARD M. DOE,
Associate Justice.

Mr. Justice Campbell did not participate in the decision of this case.

And on the same day to wit: the second day of April, 1910, being one of the regular juridical days of the January term of said Court, 1910, the following order and judgment, inter alia, was had and entered of record in said cause, in words and figures following, to wit:

113 No. 1136.

SANTA FE, PRESCOTT AND PHOENIX RAILWAY COMPANY, a Corporation, Appellant,
vs.
GRANT BROTHERS CONSTRUCTION COMPANY, a Corporation, Appellee.

This cause having been heretofore submitted, and by the Court taken under advisement, and the Court having considered the same and being fully advised in the premises:

It is ordered that the judgment of the District Court be, and the same is hereby, affirmed.

It is further ordered, adjudged and decreed that the appellee herein do have and recover of and from the Santa Fe, Prescott and Phoenix Railway Company, a corporation, appellant herein, and National Surety Company, a corporation, surety on Supersedeas Bond herein, the sum of Nine Thousand Sixty-one ($9,061) Dollars, with interest thereon at the rate of six per cent (6%) per annum from the 8th day of May, 1909, until paid, together with its costs in this court, taxed at thirty-nine and 85/100 ($39.85) dollars, and its costs in the court below in this cause incurred.

And on to wit: the eighteenth day of April, 1910, came the appellant by its attorneys and filed in the clerk's office of said court in said entitled cause its certain Motion for Rehearing in words and figures following, to wit:

114 In the Supreme Court of the Territory of Arizona.

SANTA FE, PRESCOTT & PHOENIX RAILWAY COMPANY, a Corporation, Appellant,
vs.
GRANT BROTHERS CONSTRUCTION COMPANY, a Corporation, Appellee.

Application for a Rehearing by the Supreme Court.

To the Honorable Supreme Court of the Territory of Arizona, and to the Honorable Chief Justice and Associate Justices Thereof:

Your petitioner, Santa Fe, Prescott & Phoenix Railway Company, respectfully applies for a rehearing of the above entitled cause, and in this behalf your petitioner submits, that by reason of an apparent inadvertent misapprehension of some of the controlling facts
115 in said cause, and of the arguments of your petitioner based thereon, the learned Court has rendered an erroneous decision, which it would not otherwise have rendered.

The Opinion.

For the convenience of reference the opinion is here quoted in full:

"This is an appeal from a judgment for $9,061 rendered by the District Court of Maricopa County as damages for the loss by fire of the property of the appellee while in transit on the road of the appellant company.

"The facts in this case appear to be that prior to June 5th, 1907, the construction company had been engaged in grading a railroad for the appellant; the contract under which this road was constructed (composed of eighteen sub-heads or paragraphs) contained among other conditions and provisions the following, to wit:

" '14. Water will be delivered in cars at the end of the track at the rate of one dollar and fifty cents ($1.50) per 1000 gallons, and supplies will be hauled to end of track, both in the usual manner of construction trains, subject to delays, etc., incident thereto. All risk of loss or damage to be borne by the contractor.

" '15. The company will furnish a rate of one cent per ton mile from all points on the S. F. P. & P. Road, and leased roads,
116 to the contractor on camp and grading outfit and supplies, etc., except explosives and commissary goods, and return to original shipping point at same rate on completion of the work. All movements of gods at less than tariff rates to be at consigne's risk of loss and damage.

" '16. The company will also furnish the contractor's employees * * * a rate of one cent per passenger mile * * * and return those who have worked until completion of contract at same rate. Passengers carried at less than tariff rates will be required to assume all risks of accidents to persons and baggage. The plan of movement of these employees and freight is to be according to the rule of the general freight and passenger agent.'

"This contract was based upon a proposal for bids made by the appellant under which the appellee was the accepted bidder. The proposal contained the stipulations as they appear in the above quotation from the contract.

"On June 5th, 1907, upon the completion of the construction of the road bed, the appellants, at the request of the appellee, placed certain cars at the end of the track some twelve miles west of Bouse (the last regular station west on the A. & C. Road) and appellee loaded thereon its camp and grading outfit, and several of its workmen, and the cars were hauled by appellant to Bouse; the appellee unloaded a quantity of powder and hay, and purchased
117 transportation for the workmen; the said cars and contents were way billed to Phœnix, Arizona, and the cars were then and there cut into and became a part of appellant's regular freight train No. 12.

"Appellant's regular freight train No. 12 then proceeded from Bouse towards Phœnix, via Wickenburg. About eleven o'clock on the night of June 5th, 1907, at a point between Bouse and Wickenburg, known as the A. & C. Junction, the conductor in charge of

train No. 12 cut out therefrom ten cars, and left them upon a side track. Six of these cars were loaded with the outfit of the appellee; one was a commercial car of ore, and three were empty cars. Train No. 12 then proceeded to Wickenburg with its remaining cars. These consisted of a combination or caboose car, two cars of live stock, being part of the shipment of appellee and one empty car.

"On the morning of June 6th, 1907, four of the cars loaded with the grading outfit and other property of the appellee that had been left upon the sidetrack were, with their contents, destroyed by fire.

"There was no station agent of the appellant at the sidetrack at the A. & C. Junction where the fire occurred; no water tank nor any water supply there; no inhabitants there; and no one was left in charge to look after the cars thus sidetracked by the appellant.

"The appellee brought suit in the District Court of Mari-
118 copa County to recover for the loss of that portion of the camping outfit, and other property that was destroyed by the burning of the cars and their contents.

"The case was tried to a jury and a verdict returned for $9,061.00 damages and judgment rendered thereon. A motion for a new trial was denied. From the judgment and the denial of the motion for a new trial this appeal has been taken.

"The appellant in support of its various assignments of error, has presented and urged five legal propositions.

" '1st. That the contract for the movement of appellee's goods in connection with the construction by it of appellant's road was valid, and it relieved appellant from liability for the loss of appellee's goods, no matter how caused.'

"Appellant contends that in handling appellee's goods under the contract, it acted as a private carrier, and if so, would have a right to protect itself by the exemption contained in the contract from liability, even if occasioned by its own negligence. This was the theory upon which the appellant tried the case in the lower court, while the theory upon which the case was tried by the appellee was that the appellant acted as a common carrier, and would
119 therefore, even under the terms of the contract, be liable for loss occasioned by its negligence.

"It is conceded that a public carrier may, under some circumstances, act as a private carrier. A common carrier may become a private carrier when 'as a matter of accommodation or special engagement he undertakes to carry something which it is not his business to carry.'

"Liverpool Steam Co. v. Phœnix Ins. Co., 129 U. S. 397.

"L. N. A. & C. R. Co. v. Keefer, 38 L. R. A. 93.

"Railroad Co. v. Lockwood, 17 Wall. 357.

"4th Elliott on Railroads, page 11, states the rule:

" 'Where there is a right to refuse to perform the services requested, there is a right to contract for their performance in a different capacity from that which rests upon a railroad company as a public or common carrier.'

"Mr. Hutchinson in his excellent work on Carriers, submits (1st Hutchinson, Section 48) as a test by which we can determine

whether a party assumes the duties and responsibilities of a common carrier, five characteristics:

" '1. He must be engaged in the business of carrying goods for others as a public employment, and must hold himself out
120 as ready to engage in the transportation of goods for persons generally as a business, and not as a casual occupation.

" '2. He must undertake to carry goods of the kind to which his business is confined.

" '3. He must undertake to carry by the methods by which his business is conducted, and over his established roads.

" '4. The transportation must be for hire.

" '5. An action must lie against him if he refuses, without sufficient reason, to carry such goods for those who are willing to comply with his terms.'

"Applying these tests to the appellant in the case at bar, we find that:

"1. It is engaged in the business of carrying goods for others as a public employment.

"2. It undertakes, as a business, to carry goods of the kind now under consideration. The appellant's witnesses testified that the rate charged the appellee in the contract is less than the tariff rates; that one cent per ton mile was less than the established rate charged to the public. It was conceded that it had a rate for the carrying of this particular kind of goods, and that it held itself out as a common carrier thereof.

"3. That appellant agreed to carry by its usual method and over its established road the property, goods and commodities in question. The contract provides that 'the company will furnish a rate of one cent per ton mile from all points on the S. F. P. & P. Road,
121 and leased roads for contractors on camp and grading outfit supplies, etc., except explosives and commissary goods, and return to original shipping points at same rates on completion of the work. All movements of goods at less than tariff rates to be at consignee's risk of loss and damage.'

"It has been urged in this connection that the cars were spotted by appellant, loaded by the appellee, and afterwards picked up by the appellant at the end of the track several miles west of Bouse, its last regular station, and that they were brought to Bouse for appellee's accommodation, and that such service could not have been compelled by the appellee. It is not necessary to determine the relation that existed between the parties, or where would have rested the liability for loss if any had occurred while the cars and goods were being brought from the end of the track to the station. The contract on which the appellant relies in this instance does not provide for picking up the cars at the front, but only for returning to original shipping point on completion of work from all points on the S. F. P. & P. railway or leased roads. The word 'points' would, by a fair construction, mean station or point where appellant was doing its regular business as a common carrier. The acts made obligatory on the appellee by the contract are to be considered in this connec-

tion rather than acts that may have been voluntarily per-
122 formed by it. The test we are applying says, 'When it un-
dertakes to do, etc.' The provision in paragraph 14 for hauling water and supplies to the end of the track during construction does not provide for hauling camp and grading outfits, either to or from the end of the track, but seems to be a provision for hauling water and supplies during the course of construction, while the shipment of the camp and grading outfit after completion of the work appears to have been had under the provisions contained in paragraphs 15 and 16 of the contract.

"It would not be material whether the appellee had brought in its camp and grading outfit to the station of Bouse, and there shipped it to the point from which it had been shipped in at commencement of work, or whether the cars being furnished at the front, the appellant had picked up these cars for it, and brought then into Bouse. Neither is it material whether in so doing the appellant acted as a private or common carrier; whether it was done for hire or gratis. The fact is established that at Bouse, a point on the railroad operated by the appellant the camp and grading outfit was received. One provision of the contract excepts explosives and commissary goods. The record discloses that on arriving at Bouse, the party in charge of the outfit unloaded some powder and hay;
purchased transportation from Bouse to Phœnix for the em-
123 ployees at the rate provided by the contract; the cars were
way billed by appellant's agent (presumably at the rate of ont cent per ton mile) and cut into and became a part of appellant's regular freight train No. 12, the plan of movement of which was admittedly according to the rules of the general freight and passenger agent of the appellant company.

"4. The transportation must be for hire. This point is conceded as definitely established by the facts, as well as by the wording of the agreement.

"5. An action must lie upon a carrier's refusal without sufficient reason, to carry such goods, if the party is willing to comply with its terms. When the freight and passengers in question were tendered to appellant at Bouse, from which point we have just stated the goods were way billed by its agent, and transportation for the passengers was purchased from its agent, although at the reduced rates provided in the contract, there is no question but that a duty rested upon the appellant to transport the goods and employees at the rate named in the contract, and an action would lie for its refusal to do so.

"The appellant, under the above rule, was a common carrier, and was, as such, transporting the goods at the time when they were sidetracked at the point where they were afterwards destroyed by fire.

"It is conceded that a common carrier may, by an agreement to
that effect, based upon proper consideration, limit its liabil-
124 ity for loss of or damage to goods of a shipper, except such
as may be caused by its own negligence.

"Adams Exp. Co. v. Carnahan, 94 Am. St. 279.

"'When a carrier has a regularly established business for carrying all or certain articles, and especially if that carrier is a corporation created for the purposes of the carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, it is a common carrier, and a special contract about its responsibility does not divest it of that character.'

"Liverpool, etc., St. Co. v. Phœnix Ins. Co., 129 U. S., 397.
"Railroad Co. v. Lockwood, 17 Wall. 376.
"Mears v. N. Y. N. H. & H. R. Co., 75 Conn. 171, 96 Am. St. Rep. 192.
"Richmond v. Southern Pacific, 67 Pac. 947.

"The foregoing principle is so well established by weight of authority that it is considered elementary in the law of carriers. Under this rule the limitations in the contract will protect the appellant against liability for any loss or damage, except that caused by its own negligence.

"This leaves us to consider whether the loss in this instance was caused by the negligence of the appellant. The second proposition urged by the appellant is that 'assuming for the sake of
125 argument that the contract did not in law relieve the appellant from liability for the loss of the goods caused by its negligence, yet the burden was upon the appellee to show by a preponderance of the evidence that some negligence of appellant was the proximate cause for the loss of the goods. This burden appellee totally failed to carry.' It is conceded that the burden was upon the appellee to prove by a preponderance of the evidence that the loss was occasioned by the negligence of the appellant, and the Court instructed the jury to that effect. Appellant states that the appellee totally failed to carry this burden. The question as to whether or not the appellee met this requirement was a question of fact for the jury. The learned Court carefully instructed the jury on this point as follows:

"'The vital question in this case is to determine whether these goods were lost or destroyed by reason of the neglect of the railroad company. Because if they were not, Grant Brothers have to stand the loss. If they were lost through the railway company's negligence, then the railroad company must stand it. Now the question of whether the goods were lost through the railroad company's negligence or not is one of fact for you to determine, and the burden of proving it is upon the Grant Brothers Construction Company, the plaintiff in this case. They must satisfy you by a preponderance of the evidence that this loss of these goods was brought about by negligence of the railroad company; if you are satisfied by a pre-
126 ponderance of the evidence that the loss was caused by negligence of the railroad company, then you ought to award the damages for the value of the goods; if you are not so satisfied by a preponderance of the evidence that the loss was caused by the negligence of the railroad company, then you should not award any damages at all, and you should in that event find for the defendant.'

"The Court likewise defined negligence at considerable length, and then states:

"'The jury in this case, taking this as a definition of negligence, [illegible] to find from the facts surrounding the transaction in question whether or not the defendant company has committed negligence, and if they so find, and further find that such negligence was the proximate cause of the destruction of plaintiff's property by fire, then the verdict shall be for plaintiff.'

"The facts in the case are undisputed. There is no conflict in the testimony in regard to the facts and circumstances surrounding the shipment of the goods from Bouse, and the setting out on the side-track at the C. & A. Junction, of the cars and contents that were afterwards destroyed by fire, but the effect of these circumstances and facts in establishing negligence on the part of the appellant might be differently construed and considered by different conscientious intelligent men in determining the ultimate fact of negligence.

For that reason a submission of the question to the jury by
127 the trial court was eminently proper, and for that reason it cannot be said that the appellee failed to carry the burden of proof. The determination of this question disposes of the next proposition urged by the appellant, that the court erred in denying the appellant's motion for a directed verdict.

"The fourth proposition urged is the error of the Court in instructing the jury. An examination of the Court's charge to the jury discloses no reversible error.

"The last proposition urged is the error of the Court denying the motion to set aside the verdict and grant a new trial. In support of this no argument is offered, and it may be disposed of by saying that if the question of negligence was one of fact for the jury, and there was evidence in the record to sustain their verdict, the denial by the trial court of the motion to set aside the same was fully sustained by the record.

"The appellant, although it based its first legal proposition on the statement that 'the contract for the movement of supplies and goods in connection with the construction of appellant's road, was valid,' has in the latter part of its brief urged that such contract would, by offering a different rate than that offered to the public generally be invalid by reason of coming within the inhibition of the Interstate

Commerce Law. In reply to this it may be said that this was
128 not a private contract personal to Grant Brothers as a corporation, but was included in the appellant's proposal for bids, the benefit of which would accrue to anyone who would be the successful bidder. The right, however, of a railroad, as a common carrier, to grant such terms was recognized by the Interstate Commerce Commission as quoted by appellant on pages 73 and 74 of its brief:

"'On October 12, 1906, the Commission announced an Administrative Ruling as follows: "Issuance and use of free passes. * * * But the Commission does not construe the law as preventing a carrier from giving. * * * Nor does the Commission construe the law as preventing a carrier from giving free or reduced rate carriage over its line to contractors for materials, supplies and men for use in construction, improvement or renewal work on the line of that carrier;

provided such arrangements for such free or reduced rate carriage are made a part of the specifications upon which the contract is based, and of the contract itself.'"

"The arrangements for reduced rate carriage of men, material and supplies were, in the case at bar, made a part of the specifications on which the contract was based, and of the contract itself.

"The record discloses no reversible error, and the judgment of the lower court is therefore affirmed."

129 I.

Too narrow a meaning is given to the word "points" in the fifteenth clause of the contract, quoted near the beginning of the opinion.

It is obvious that from the inherent nature of railroad construction, both the company and the contractor must see the necessity of providing for the hauling of the contractor's outfit from point to point on the track in course of construction, moving them continually to the "front," as that point changes in the progress of the work, and returning them from the "front" or end of the track upon completion of the work. The delay and expense resulting from any other method of transportation would be intolerable. As this transportation must cost something, the railroad company would necessarily expect to be reimbursed for it by a fixed rate or a specification in the contract calling for a bid based upon the estimated cost of the transportation. Clearly the fixed rate is the more practical mode of adjustment, and therefore it was adopted in the contract at bar. We submit that in view of the necessity of dealing with this item of outfit transportation between points on the road being built, if language can be found in the contract susceptible of a construction which provides for such transportation, that construction should be given to that language. And so, we respectfully submit, the language in clause 15, "from all points," cannot be construed
130 as meaning only regular stations on the part of the road in operation, but must be held to mean just what it says, every point on all parts of the road, and, a fortiori, every point on the part of the road to be constructed under the contract, where such transportation must be constantly needed. That this was the intention of the contracting parties is clear not merely from the rationale of the situation, but from the language of clause 17 of the contract, which reads:

"17. The company will also secure for the contractor similar rates over the Santa Fe Company's Coast Lines, on Camp and Grading Outfit, in carload lots, both to and from the work * * *"

There is no conceivable reason why the rate of one cent per ton mile should apply to a haul from a point on the Coast Lines to and from the work any more than on the defendant's road to and from the work. The meaning of clause 15 is clearly reflected in clause 17, which undertakes to furnish the one cent rate "to and from the work" also over the Coast Lines.

As the contract provision for carrying appellee's outfits "to and from" the work involved their carriage over the part of the road not

yet in operation, as well as over the part of the road in operation, it inevitably follows that the haul in question commenced at "the front," 12 miles west of Bouse, under the contract. It was
131 a mere incident of the contract, and cannot be split up into one haul from "the front" to Bouse and another from Bouse to Wickenburg. It was one haul under the contract.

It is therefore also indisputable that the goods were tendered and accepted under and in virtue of the contract, at a place where, but for the contract, the appellant was under no obligation whatever to accept them for carriage. In other words, the legal obligation of a common carrier did not result from the tender of the goods there. We respectfully assert and insist upon the proposition found in our briefs, that there can not be and is not any distinction in principle between the right to refuse to accept goods because of their character and the right to refuse them because of the place where they are tendered. The gist of the matter is the right to refuse. The cause of the right is immaterial. No one has pretended for a moment that, in the absence of the contract, appellant would have been under any obligation to accept appellee's goods, tendered at a point on appellant's road where there was not only no station, but the road was not yet opened to the public.

We say, further, that appellant's picking the cars up at "the front," on an unopened section of the track where there was no station and as to which no schedules for running trains pevailed, and tacking those cars on to a regular freight train on the opened road,
132 was not "carrying by its usual methods and over its established road."

We submit, with deference to the learned Court, that, applying the test stated by Hutchinson, the case at bar lacks the following elements essential to give appellant the character of a common carrier:

1. The goods which the contract compelled it to receive at the front were tendered to appellant there, and that was a place at which the law did not oblige it as a common carrier to accept them. But for the contract it could have refused to carry them, and no action would have lain for the refusal.

2. The carriage was not made "by the methods by which business is conducted, or over his established roads." The haul was one continuous haul under the contract and cannot be split up into parts for the purpose of evading the contract and making appellant a private carrier as to one part and a common carrier as to another.

With these two essential elements wanting, we insist that appellant did not act as a common carrier, but as a private carrier under a special contract with appellee, not as one of the general public, but as a private contractor for the construction of the road.

II.

We submit that the learned Court has overlooked the un-
133 derlying principle of the ruling of the Interstate Commerce Commission mentioned near the close of the opinion.

In the first place, the Interstate Commerce Act expressly prohibits the carrying of any goods at a less rate than that fixed by the carrier's

regularly published tariff on such goods. So long as such rate remains unchanged by a new tariff, regularly established by filing it with the Commission, publishing and posting it, it is unlawful for the carrier to carry such goods at any other than the fixed rate. We insist, with deference to the learned Court, that the rate cannot be lawfully reduced by simply issuing a call for bids on construction work, in which a less rate is named. Every essential element of a lawful change of rate is here wanting. The call is not filed with the Commission; it is not published as required; and it is not posted or kept at the regular stations of the road as required. To say that appellant could thus lawfully change its tariff rate which, as the learned Court says appellant concededly had established, is to emasculate the tariff provisions of the Act and open the door to the very kind of subterfuge and evasion which all the cases hold will not be countenanced.

If, then, the letting of the contract at bar did not constitute a lawful change of the appellant's tariff rate on grading and camp outfits, it was illegal, null and void on its face, unless it was made
134 by appellant as a private, not a common carrier. There is absolutely no escape from the conclusion. Either the contract on which appellee expressly grounds its complaint is void as an illegal attempt to deviate from appellant's regular tariff, or it is valid as a contract with appellant as a private carrier.

In the second place, the plain reason of the Interstate Commerce Commission's decision, quoted in our opening brief at pp. 72-76, is that in carrying such goods for contractors engaged in constructing a carrier's road the carrier is not dealing with the contractor as a member of the general public, and is not transporting the goods as a common carrier. The ruling of the Commission embraces two instances of reduced rate service, one the carrying of the class of goods in question for contractors, the other the carrying of materials, supplies and men for telegraph companies maintaining telegraph lines on carriers' rights of way. In these instances the ruling is based on the inherent necessity of private contracts for construction, extension and repairs of the road, on the one hand, and an adequate telegraph system on the other.

The obvious purpose of this proviso is that there shall be no question possible as to the character of the carriage. It must be for the benefit of the carrier in its private capacity. Can it be said that the Commission intended to arrogate to itself the function
135 and power of Congress and promulgate a new method of changing a tariff rate lacking wholly the essentials prescribed by the Interstate Commerce Act? We say most emphatically no. The ruling cannot stand on any other basis than that it contemplates such contracts as made with the carrier in its private capacity. It stands today unmodified, and no case can be found in which it has been even hinted that the Commission has stultified itself by placing the construction suggested by the appellee upon such contracts. But, further, in summing up its conclusion concerning telegraph companies, the Commission used the following language, which we

submit is equally applicable to construction contractors (opening brief, p. 75, bottom of page):

"So far as we can see, the full performance of such contracts by the carriers with whom they are made would not affect any public or private interest adversely."

Now, what "public or private interest" had the Commission in mind? Clearly no other than those contemplated by the Interstate Commerce Act. It does not lie in the mouth of that body to talk about any other interests. The whole raison d'etre of the Commission is that it may aid in the successful administration of the Act. What is the public interest? Nothing but the interest of the shipping and traveling public in the establishment and en-
136 forcement of uniform rates available to all. What is the private? Nothing but the interest of any and every individual shipper and traveler in securing the same rate that any other can secure. So when the Commission announces that the full performance of such a contract as the one at bar does not affect any public or private interest adversely, it can only say so because it regards the contract as made with the carrier in its private character with its private contractor; certainly not as an ordinary contract made with it as a common carrier by a member of the general shipping public. We think that the learned Court inadvertently overlooked the portions of the ruling of the Commission here referred to, and, consequently, the controlling effect which the ruling has in this case. The inexorable logic of the ruling is that the contract between appellant and appellee is valid only because it is one for private carriage by the appellee.

As the contract is for private carriage, it is purely immaterial that at a certain point in the haul from the front to Wickenburg, to-wit, Bouse, the appellant's agent way billed the outfit. The evidence is express that only one way bill was made for the entire train, no freight receipt or bill was delivered to appellee, nor was a copy of the way bill given to it (appellee's witness Foreman O'Brien, f. 138). The way bill was made out solely for the convenience of the appellant, its purpose being to secure the weighing of
137 the cars at Phœnix (f. 170). This had not the slightest effect on the character of the contract, as it was just as appropriate to a private as to a public carrier.

We submit, therefore, that the contract at bar is clearly for a private carriage, for the reasons:

1. The complaint is based upon the contract, and appellee must stand or fall with the contract. The contract under which the goods were carried consists of the original agreement of December 12, 1904, and the letter of November 24, 1905, extending the terms of the agreement to the construction of appellant's A. & C. road east of Salome, i. e., about 12 miles east of Bouse.

2. The contract provided for carriage of appellee's camp and grading outfits:

(1) From a point where there was no station and the road was not open to the public, and where appellant as a common carrier had the absolute right to refuse then;

(2) Over a portion of the road not yet "established," in the sense that it was ready and opened for public service;

(3) Not by the methods by which its business as a common carrier was conducted, but by spotting foreign cars of a road with which appellant did not exchange cars, at appellee's request, so that they could be hauled by the Southern Pacific Company into Mexico without reloading; hauling the cars over an unopened part of
138 the A. & C. road, where there was no schedule of train times, at a time selected by the appellee; coupling the cars to a freight train without issuing any freight receipt or other token of surrender of charge of the goods by appellee, or assumption of such charge by appellant; and allowing the appellee while so in charge of the goods to unload a part of them, i. e., powder and hay, without let or hindrance of appellant.

(4) For a "hire" or rate which would have been unlawful had the contract not been one of private carriage.

(5) The legality of such a contract has been recognized by the Interstate Commerce Commission in a ruling which clearly stands upon the fact that the carriage is in no sense a public, but a private carriage for a contractor engaged in constructing defendant's road whose goods are not tendered by him as one of the general shipping public, but merely as an incident to the construction contract. The rate of one cent per ton mile—much less than appellant's tariff—is only justifiable on the ground that the appellant was a private carrier under the contract.

III.

The Court erred in assuming that the work and the transportation referred to in the complaint and in the case were done under the contract of 1904, which contract was made upon bids.
139 The fact is, and it appears in the record at page 74 of the abstract, that the transportation in question was given under a new contract which provided for work west of the line built under the contract of 1904. This new contract was made by a letter dated January 24, 1905 (see abstract, pages 18 and 74), and there is nothing in the record to indicate that this new contract was made under bids or that any opportunity was given to any person except the plaintiff to enter into this new contract or to obtain any rights under it. So that it cannot be said, as the opinion says, that this was not a private contract personal to Grant Brothers as a corporation, but was included in the appellant's proposal for bids, the benefits of which would accrue to any one who would be the sucessful bidder. The fact is the direct contrary. This new contract was personal and all its benefits were personal to Grant Brothers, and were never open to any one else.

It is just the same as if you called for bids for building a house and let the work to the lowest bidder. As that work approached completion, you were so well pleased with it that you said to the contractor, I will pay you so much to build me a second house on somewhat different plans. Now the first house was plainly built on bids, but just as plainly the second was not. In the case at bar not only

was the work under the second contract not contemplated
140 when bids were called for, but the payment per yard of dirt and rock moved was increased. No one was given a chance to get this contract except Grant Brothers. So whatever strength the argument of the opinion on this point shows against us on the premise that the contract was open to bidders, it must have the same strength for us when attention is called to the fact that for the work here involved no bids were called for and no tender of the work made to anyone except the plaintiffs.

The order of the Interstate Commerce Commission is that the provision for free transportation or reduced transportation must be made in the specifications as well as in the contract. But that is not equivalent to saying that bids must be called for. There may be specifications without bids. There is nothing in the ruling of the Interstate Commerce Commission requiring that bids be called for before the making of a contract, and certainly it has not been the practice with respect to all contracts for construction that they be open to bids.

The requirement of the Commission was fully satisfied by the letter in terms modifying the original specifications and contract, and adopting the specifications and contract as so modified. The reason of the requirement that the provision for transportation be made in the specifications is to prevent unfair alteration of the specifications by the contract for a favorite contractor.

141 IV.

There is error in the opinion in its reference to a ruling by the Interstate Commerce Commission.

The opinion reads:

"The right, however, of a railroad as a common carrier to grant such terms was recognized by the Interstate Commerce Commission."

We cannot find any intimation in anything said by the Interstate Commerce Commission that the terms granted are granted by the railroad as a common carrier. We construe the ruling to the contrary and think that the Interstate Commerce Commission made the ruling on the theory that in such connection the carrier was not a common carrier and was not acting as such, and because of that might do what the law prohibited a common carrier from doing.

V.

Was the evidence such that a reasonable man might find from it that the defendant was negligent?

We hesitate to call attention to this matter, for it has manifestly engaged the Court's attention and received some consideration. The Court states that the evidence is not conflicting, but says that from it reasonable men might draw different conclusions. No argument or reasoning is given to support the statement. We respect-
142 fully submit that it is impossible to distinguish the case as made on our record from the case of Charnock, 194 U. S.

342, 48 L. Ed. 1057, where the Supreme Court held that there was nothing on which a jury could predicate negligence. We cannot but believe that the authority just cited has in the press of the Court's business failed to receive the attention which it deserves. In order that this petition may not be too much extended, we shall not here quote from the evidence nor from the Charnock opinion, but must respectfully ask further attention to our opening brief, pages 78-84, and to our closing brief, pages 22-25.

VI.

The opinion wholly fails to discuss or mention a controlling proposition.

Assuming that the opinion is not open to any of the criticisms which we have thus ventured to make on what is said therein, we have yet to suggest that it omits any consideration of a proposition which would alone require a reversal of the judgment of the court below. We refer to the doctrine of avoidable consequences stated and argued in our briefs. Whatever risk or damage was involved in leaving the cars at A. & C. Junction must have been just as apparent to the plaintiff's foreman and its men in charge of the outfit as to defendant's conductor. It seems to us almost grotesque
143 to say that with full knowledge of the situation and forty men at their disposal, the plaintiff's foreman could leave the goods at the junction without one of the forty men to guard them, and still recover for their loss. What becomes of the rule that where a party, by slight care and expense, can prevent a loss, if he fails to do so he cannot recover? We respectfully refer the Court to our opening brief (p. 89, "The Rule of Proximate Cause Applies to this Case") and our reply brief (p. 38, "The Doctrine of Avoidable Consequences Clearly Applies"); and in addition to the authorities therein cited, we cite the following:

Fowle v. Park, 48 Fed. 789, 792.
Pa. R. Co. v. Washburn, 50 Fed. 335.
Burdon v. Cent. Sug. Ref. Co., 78 Fed. 417, 427.
Cunningham Iron Co. v. Warren & Co., 80 Fed. 878, 880.
Warren v. Stoddard, 105 U. S. 230; 26, 1117.
Am. & Eng. Enc. of Law, 605.

For the foregoing reasons we respectfully submit that a new hearing in this case should be granted.

PAUL BURKS,
L. H. CHALMERS,
Attorneys for Defendant.

E. W. CAMP,
A. H. VAN COTT,
Of Counsel.

Dated April 14, 1910.

144 And on to-wit: the twentieth day of May, 1910, being one of the regular juridical days of the January term of

said court, 1910, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

At this day, it is ordered by the Court that the Motion for Rehearing filed herein by appellant, be submitted.

And on to-wit: the twenty-first day of May, 1910, being one of the regular juridical days of the January term of said court, 1910, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

At this day it is ordered by the Court that the Motion for Rehearing filed herein by appellant, and heretofore submitted, be, and the same is hereby, denied.

And on the same day to-wit: the twenty-first day of May, 1910, being one of the regular juridical days of the January term of said court, 1910, the following other order was had and entered of record in said cause in words and figures following, to-wit:

145 Title of Cause.

At this day, on motion of Mr. Paul Burks for appellant herein, it is ordered by the Court that the Mandate in this cause be stayed for sixty days.

And on to-wit: the nineteenth day of July, 1910, came the appellant by its attorneys and filed in the clerk's office of said court in said entitled cause its certain Petition for Writ of Error in words and figures following, to-wit:

In the Supreme Court of the Territory of Arizona.

SANTA FE, PRESCOTT AND PHŒNIX RAILWAY COMPANY, a Corporation, Appellant,

vs.

GRANT BROTHERS CONSTRUCTION COMPANY, a Corporation, Appellee.

Petition for Writ of Error.

Comes now the Santa Fe, Prescott and Phœnix Railway Company, a corporation, appellant above named, and respectfully shows that the above entitled cause is now pending in the Supreme
146 Court of the Territory of Arizona and that a judgment therein has been rendered on the 2d day of April, 1910, affirming a judgment of the District Court of the Third Judicial

District of the Territory of Arizona in and for the County of Maricopa, in favor of the appellee, for damages in the sum of $9061.00, together with interest and costs (said judgment being for an amount in excess of $5,000 exclusive of costs); that the motion for a rehearing of said cause was denied on the 21st day of May, 1910, and that this cause is a proper cause to be reviewed by the Supreme Court of the United States on writ of error.

Wherefore said Santa Fe, Prescott and Phœnix Railway Company prays that a writ of error may issue in this behalf to the Supreme Court of the United States and that the clerk of the Supreme Court of the Territory of Arizona be directed to send the record and proceedings of said cause with all things concerning the same to the Supreme Court of the United States in order that the errors complained of in the assignment of errors herewith filed by said appellant may be reviewed and, if error be found, corrected according to the laws and customs of the United States.

Dated at Prescott, Arizona, this 16th day of July, 1910.

E. W. CAMP,
PAUL BURKS,
A. H. VAN COTT,
Attorneys for Appellant.

ROBERT DUNLAP,
Of Counsel.

147 Allowed this 16th day of July, 1910.

EDWARD M. DOE,
Associate Justice of the Supreme Court of the Territory of Arizona.

And on the same day to-wit: the nineteenth day of July, 1910, came the appellant by its attorneys and filed in the clerk's office of said court in said entitled cause its certain Assignment of Errors in words and figures following, to-wit:

In the Supreme Court of the Territory of Arizona.

SANTA FE, PRESCOTT AND PHŒNIX RAILWAY COMPANY, a Corporation, Appellant,
vs.
GRANT BROTHERS CONSTRUCTION COMPANY, a Corporation, Appellee.

Assignment of Errors.

Comes now Santa Fe, Prescott and Phœnix Railway Company, appellant above named, and shows that in the record herein there is manifest error and that the Supreme Court of the Territory of Arizona erred in this, to-wit:

I.

148 In sustaining the ruling of the trial court in overruling the demurrer of the appellant to the complaint of the appellee.

II.

In sustaining the ruling of the trial court denying the motion of the appellant to direct the jury to return a verdict for the appellant made at the close of the case of appellee.

III.

In sustaining the ruling of the trial court denying the motion of appellant made at the close of all of the testimony to direct the jury to return a verdict for the appellant and against the appellee.

IV.

In sustaining the ruling of the trial court in refusing to give the instruction numbered I requested by the appellant in the words and figures following:

"The court instructs you to return a verdict for the defendant."

V.

In sustaining the ruling of the trial court in refusing to give the instruction numbered IV requested by appellant in the words and figures following:

"The Court instructs you that the effect of the covenant in the construction contract whereby the Construction Company agreed that, 'all movements of goods at less than tariff rates to be at consignee's risk of loss or damage' was to relieve the railway company for any liability for such loss or damage except when such loss or damage resulted from gross negligence on the part of the railway company or its employés."

149

VI.

In sustaining the ruling of the trial court in refusing to give the instruction numbered V requested by appellant in the words and figures following:

"The Court instructs you that it was not negligence on the part of the Railway Company to leave the cars containing the camp equipment and grading outfit of the construction company upon the side track at A. & C. Junction without stationing a man at such side track to watch and guard such cars."

VII.

In sustaining the action of the trial court in instructing the jury as follows:

"The important question of fact for you to determine in the case is whether or not this railroad company, in leaving these cars on that sidetrack, was guilty of what is known in law as negligence."

VIII.

In sustaining the action of the trial court in instructing the jury as follows:

"Now gentlemen, the first question for you to determine in this

case before you get to the question of damages at all, is the question of negligence, because in this case the Court leaves it to the jury to determine as a question of fact whether or not this railroad company was guilty of negligence in leaving the cars at this place, and then if it was so guilty of negligence, was that negligence the cause—the proximate cause—of this loss of goods. Now that question, which is the vital question in the case, the Court leaves to the jury to determine as a question of fact."

IX.

In sustaining the action of the trial court in instructing the jury as follows:

150 "By this contract the railroad company was not freed from any liability for loss if that loss was brought about by the railroad company's negligence, but it would be freed from liability for any other cause of loss. Therefore, the vital question in this case is to determine whether these goods were lost or destroyed by reason of the neglect of the railroad company. Because if they were not, Grant Brothers have to stand the loss. If they were lost through the railroad company's negligence, then the railroad company must stand it. Now the question of whether the goods were lost through the railroad company's negligence or not is one of fact for you to determine, and the burden of proving it is upon Grant Brothers Construction Company, the plaintiff in this case."

X.

In sustaining the action of the trial court in instructing the jury as follows:

"Now the actual way in which this fire occurred is not shown by the testimony. The vital thing for you to determine is whether it was negligence on the part of the railroad company to leave the cars on this sidetrack in the way they did under the circumstances in this particular case."

XI.

In sustaining the action of the trial court in instructing the jury as follows:

"Now this is the vital issue in this case—this question of whether or not this act of the railroad company in leaving the cars on that side track under the circumstances in this case, was, or was not, negligence, and if it was negligence, did that negligence cause the fire."

XII.

In sustaining the action of the trial court in instructing the jury as follows:

"So, gentlemen, you see after all it is a simple question for you to determine, for the circumstances surrounding this are
151 practically admitted and the one vital question for you to determine is, was the one act of the railroad company in leaving the cars on the sidetrack under the circumstances of the case negligent or was it not."

XIII.

In sustaining the ruling of the trial court in overruling and denying appellant's motion for new trial.

XIV.

In refusing to sustain the first assignment of error presented to it and urged by appellant as follows, to-wit:

"Assignment I.

That the trial court erred in overruling the demurrer to plaintiff's complaint for the reasons:

First. That said complaint failed to state facts sufficient to constitute a cause of action; and

Second. That it appears from said complaint and from the contract therein pleaded that defendant was not a common carrier with respect to the transportation of plaintiff's property, but that it was a private carrier and as such was, by the terms of such contract, relieved from liability for the destruction of such goods from whatsoever cause arising."

XV.

In refusing to sustain the second assignment of error presented to it and urged by appellant as follows, to-wit:

"Assignment II.

That the trial court erred in denying defendant's motion to direct the jury to return a verdict for the defendant, for the reasons:

1. That it appears from plaintiff's complaint that, by the terms of the construction contract therein pleaded, that plaintiff expressly agreed with defendant that 'all movements of goods at less than tariff rates to be at consignee's risk of loss and damage.'

2. That it affirmatively appears from plaintiff's complaint and from the evidence, that with respect to the transportation by defendant of plaintiff's goods, defendant was not acting as a common carrier but as a private carrier or ordinary bailee.

152 3. That it affirmatively appears from the complaint and from the evidence that defendant carried and cared for plaintiff's goods with due and reasonable care, and according to the practice commonly adopted by well regulated railroads under circumstances and conditions such as existed at the time and place in question.

4. That there is no evidence in the case from which the jury could find as a fact the cause of the fire which destroyed plaintiff's goods.

5. That there is no evidence of any negligence of defendant with respect to plaintiff's goods; or that defendant neglected to perform any duty which it owed plaintiff with respect to the movement or care of said goods.

6. That there is no evidence of any negligence of defendant which was the proximate cause of the destruction of plaintiff's goods; and that the burden was on the plaintiff to prove by a preponderance of evidence that said destruction was proximately caused by negligence of defendant."

XVI.

In refusing to sustain the third assignment of error presented to it and urged by appellant as follows, to-wit:

"Assignment III.

That the trial court erred in refusing to give the instruction numbered I requested by defendant for the reasons hereinbefore set out in support of assignments I and II."

XVII.

In refusing to sustain the fourth assignment of error presented to it and urged by appellant as follows, to-wit:

"Assignment IV.

That the trial court erred in refusing to give the instruction numbered 4 requested by defendant for the reason that by the terms of the contract pleaded by plaintiff, and the supplemental contract proved at the trial, defendant was relieved from all liability for the destruction of plaintiff's goods."

XVIII.

153 In refusing to sustain the fifth assignment of error presented to it and urged by appellant as follows, to-wit:

"Assignment V.

That the trial court erred in refusing to give instruction V requested by defendant, for the reason that, upon all the evidence, it was, as matter of law, not negligence on the part of the railway company to leave the cars containing plaintiff's goods upon the side track at A. & C. Junction without stationing a man at such track to watch them."

XIX.

In refusing to sustain the sixth assignment of error presented to it and urged by appellant as follows, to-wit:

"Assignment VI.

That the trial court erred in instructing the jury that it was for them to determine whether defendant was negligent in setting the cars out at A. & C. Junction without placing a watchman over them,

and to award such damages as would compensate plaintiff for the loss of such goods, if they found that defendant was negligent in so setting out such cars; for the reasons following:

1. That by the terms of the contract pleaded by plaintiff, defendant was relieved from liability for the destruction of plaintiff's goods while so set out.

2. That there is no evidence from which the jury could find that such setting out of the cars was negligent.

3. That it was not negligence, as a matter of law, for defendant to set out such cars in the way it did.

4. That there is no evidence that the failure of defendant to leave a watchman with the cars was negligence; nor that such failure or any other act of neglect of defendant was the proximate cause of the destruction of plaintiff's goods."

XX.

In refusing to sustain the seventh assignment of error presented to it and urged by appellant as follows, to-wit:—

"Assignment VII.

That the trial court erred in denying the motion to grant defendant a new trial for the several reasons hereinbefore set out
154 in support of the preceding assignments, and especially for the reasons following:

1. That the verdict of the jury is contrary to law.

2. That the verdict of the jury is contrary to, and is not supported by, the evidence.

3. That the verdict was manifestly given under the influence of passion and prejudice and in plain disregard of justice."

XXI.

In sustaining and affirming the judgment of the trial court made and entered in the above entitled cause in favor of the appellee and against the said appellant.

Wherefore, said appellant prays that said judgment may be reversed in all things.

Dated this 16th day of July, 1910.

E. W. CAMP,
PAUL BURKS,
A. H. VAN COTT,
Attorneys for Appellant.

ROBERT DUNLAP,
Of Counsel.

And on the same day to-wit: the nineteenth day of July, 1910, there was filed in the clerk's office of said court in said entitled cause a certain Order granting petition and allowing writ of error in words and figures following, to-wit:—

155 In the Supreme Court of the Territory of Arizona.

SANTA FE, PRESCOTT AND PHŒNIX RAILWAY COMPANY, a Corporation, Appellant,
vs.
GRANT BROTHERS CONSTRUCTION COMPANY, a Corporation, Appellee.

Order.

On this 16th day of July, 1910, came appellant by its attorneys and filed herein and presented to the court its petition praying for the allowance of a writ of error intended to be urged by it, praying also that the transcript of records and proceedings and papers in said cause duly authenticated may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof said writ of error is allowed upon said appellant giving bond according to law in the sum of $15,000.00, which shall operate as a supersedeas bond.

And it is further ordered that said petition be and the same is hereby allowed and granted and that the writ of error be allowed in said cause returnable before the United States Supreme Court on the 19th day of September, 1910, and that the Clerk of
156 this court sign and seal the writ and that a transcript of the records and of all proceedings and papers in said cause shall be made and transmitted to said United States Supreme Court.

It is further ordered that the undertaking in the sum of $15,000.00 tendered by said appellant be and the same is hereby approved as the undertaking on writ of error herein.

Dated at Prescott, Arizona, this 16th day of July, 1910.

EDWARD M. DOE,
Associate Justice of the Supreme Court of the Territory of Arizona.

And on the same day to-wit: the nineteenth day of July, 1910, there was filed in the clerk's office of said court in said entitled cause a certain Bond in words and figures following, to-wit:—

157 In the Supreme Court of the Territory of Arizona.

SANTA FE, PRESCOTT AND PHŒNIX RAILWAY COMPANY, a Corporation, Appellant,
vs.
GRANT BROTHERS CONSTRUCTION COMPANY, a Corporation, Appellee.

Bond.

Know all men by these presents: That we, Santa Fe, Prescott and Phœnix Railway Company (a corporation), as principal, and A. W. Edwards and Chas. T. Joslin, as sureties, are held and firmly

bound unto Grant Brothers Construction Company, a corporation, above named, in the sum of Fifteen Thousand Dollars ($15,000.00), to be paid to said Grant Brothers Construction Company, its successors, legal representatives or assigns, to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and our and each of our successors, representatives and assigns firmly by these presents.

Sealed with our seals and dated this 16th day of July, 1910.

Whereas, the above named appellant, Santa Fe, Prescott and Phœnix Railway Company, has sused out a writ of error to the Supreme Court of the United States to reverse the judgment of said Supreme Court of the Territory of Arizona in the above en-
158 titled cause and entered on the 2d day of April, 1910, affirming a judgment in the above entitled cause for the sum of $9061.00, together with interest and costs made and entered in favor of said appellee and against said appellant on or about the 8th day of May, 1909, by the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa, a rehearing of which said cause was on the 22d day of May, 1910, denied by said Supreme Court of Arizona.

Now, therefore, the condition of this obligation is such that if the above named Santa Fe, Prescott and Phœnix Railway Company shall prosecute said writ to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

SANTA FE, PRESCOTT AND PHŒNIX
RAILWAY COMPANY,
By E. W. CAMP,
PAUL BURKS,
Its Attorneys.
Principal.
A. W. EDWARDS,
CHAS. T. JOSLIN,
Sureties.

The foregoing bond is approved both as to form and
159 amount and as to sufficiency of sureties this 16th day of July, 1910.

EDWARD M. DOE,
Associate Justice.

TERRITORY OF ARIZONA,
County of Yavapai, ss:

A. W. Edwards and Chas. T. Joslin, each for himself and not one for the other, being duly sworn, deposes and says that he is a resident and freeholder within said County of Yavapai and Territory of Arizona; that he is worth the sum specified in the foregoing undertaking as the penalty thereof over and above all his just debts and liabilities, exclusive of property exempt from execution.

A. W. EDWARDS.
CHAS. T. JOSLIN.

Subscribed and sworn to before me this 16th day of July A. D., 1910.

[SEAL.] FRANK O. SMITH,
Notary Public in and for the County of Yavapai, Territory of Arizona.

My Commission expires June 26, 1912.

160 UNITED STATES OF AMERICA,
Territory of Arizona, ss:

I, F. A. Tritle, Jr., Clerk of the Supreme Court of the Territory of Arizona, do hereby certify the above and foregoing to be a full, true and complete copy and Transcript of the Record, including the Abstract of Record, Opinion, Judgment, Motion for Rehearing, Petition for Writ of Error, Assignment of Errors, Order granting Petition and allowing Writ, Bond, and all minute entries had and entered of record in a certain cause lately pending in said court, No. 1136, wherein the Santa Fe, Prescott and Phœnix Railway Company, a Corporation, was appellant, and Grant Brothers Construction Company, a corporation, was appellee, as the same remain on file and of record in my office.

And I further certify that the same constitute the record in said cause.

And I further certify that the attached Writ of Error, Citation and Order of Enlargement are the originals issued by said Supreme Court.

In witness whereof, I have hereunto set my hand and the seal of said Court, this 20th day of September A. D. 1910, at Phœnix, Arizona.

[Seal Supreme Court of Arizona.]

F. A. TRITLE, JR.,
Clerk Supreme Court,
By ANGIE B. PARKER,
Deputy.

161 *Citation.*

UNITED STATES OF AMERICA,
Territory of Arizona, ss:

To Grant Brothers Construction Company, a Corporation:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington, District of Columbia, 60 days after the date of this citation pursuant to writ of error allowed and filed in the office of the Clerk of the Supreme Court of the Territory of Arizona, wherein the Santa Fe, Prescott and Phœnix Railway Company, a corporation, is plaintiff in error, and you, Grant Brothers Construction Company, a corporation, are defendant in error, to show cause if any there be why the judgment rendered against said plaintiff in error as in said

writ of error mentioned should not be corrected and reversed and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States this 20 day of July, in the year of our Lord One Thousand Nine Hundred and Ten.

EDWARD M. DOE,
Associate Justice of the Supreme Court of the Territory of Arizona.

162 Service of the foregoing citation and also of the writ of error mentioned therein is hereby admitted this 20 day of July, 1910, and we consent that said citation with this waiver may be filed as complete service upon us.

A. C. BAKER,
I. B. DOCKWEILER,
Attorneys of Record for Grant Brothers Construction Company, Defendant in Error.

163 STATE OF CALIFORNIA,
County of Los Angeles, ss:

—— ——, being by me first duly sworn, says that he is an officer, namely, the — of the — named in the foregoing — that he has read said — and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on his information or belief, and that as to those matters he believes it to be true.

—— ——.

Subscribed and sworn to before me this — day of ——, A. D. 190-.

—— ——,
Notary Public in and for the County of Los Angeles, State of California.

164 [Endorsed:] No. 1136. Supreme Court of the Territory of Arizona. S. F. P. & P. Ry. Co., Appellant, v. Grant Bros. Construction Co., Appellee. Citation. Filed July 19, 1910. F. A. Tritle, Jr., Clerk. Received copy of the within — this — day of ——, 190-. —— ——, Attorney for ——. E. W. Camp, A. H. Van Cott, Paul Burks and L. H. Chalmers, Los Angeles, Cal., Telephone Main 1466, Attorneys for Appellant.

165 *Writ of Error to the Supreme Court of the Territory of Arizona.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable Judges of the Supreme Court of the Territory of Arizona, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the

Territory of Arizona before you or some of you, between Santa Fe, Prescott and Phœnix Railway Company, plaintiff in error, and Grant Brothers Construction Company, defendant in error (a cause wherein a judgment rendered against said plaintiff in error for a sum in excess of Five Thousand Dollars, exclusive of costs, was affirmed by said Supreme Court of the Territory of Arizona), a manifest error hath happened to the great damage of said plaintiff in error, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the
166 United States, together with this writ, so that you have the same in the said Supreme Court at Washington, District of Columbia, on the 1st day of September, 1910, that the record and proceedings aforesaid being inspected, said Supreme Court may cause further to be done therein to correct those errors what of right and according to the laws and customs of the United States should be done.

Witness the Honorable John M. Harlan, Acting Chief Justice of said Supreme Court of the United States this 19 day of July, in the year of our Lord one thousand nine hundred and ten.

[Seal Supreme Court of Arizona.]

F. A. TRITLE, Jr.,
Clerk of the Supreme Court of the Territory of Arizona.

Allowed by

EDWARD M. Doe,
Associate Justice of the Supreme Court of the Territory of Arizona.

167 State of California,
County of Los Angeles, ss:

——— ———, being by me first duly sworn, says that he is an officer, namely the — of the — named in the foregoing — that he has read said — and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on his information or belief, and that as to those matters he believes it to be true.

——— ———.

Subscribed and sworn to before me this — day of ———, A. D. 190-.

———— ————,
Notary Public in and for the County of Los Angeles, State of California.

POOR COPY

168 [Endorsed:] No. 1136. Supreme Court of the Territory of Arizona. S. F. P. & P. Ry. Co., Appellant, v. Grant Bros. Construction Co., Appellee. Writ or Error. Filed July 19, 1910. F. A. Tritle, Jr., Clerk. Received copy of the within — this — day of ——, 190–. —— ——, Attorney for ——. E. W. Camp, A. H. Van Cott, Paul Burks and L. H. Chalmers, Los Angeles, Cal., Telephone Main 1466, Attorneys for Appellant.

169 In the Supreme Court of the Territory of Arizona.

SANTA FE, PRESCOTT AND PHŒNIX RAILWAY COMPANY, a Corporation, Appellant,

vs.

GRANT BROTHERS CONSTRUCTION COMPANY, a Corporation, Appellee.

It appearing that the Clerk of the above Court is unable to have the record ready for filing and said cause docketed in the Supreme Court of the United States by the return day,

It is ordered that the time of the above named appellant to file the record in the above cause, and to docket the above cause in the Supreme Court of the United States, be and the same is hereby extended until November 16, 1910.

EDWARD M. DOE,
Associate Justice.

170 [Endorsed:] No. 1136. In the Supreme Court of the Territory of Arizona. Santa Fe, Prescott & Phœnix Ry. Co. vs. Grant Brothers Construction Co. Order Enlarging time for filing and docketing record. Filed August 18, 1910. F. A. Tritle, Jr., Clerk. By Angie B. Parker, Deputy.

Endorsed on cover: File No. 22,342. Arizona Territory Supreme Court. Term No. 410. Santa Fe, Prescott & Phœnix Railway Company, plaintiff in error, vs. Grant Brothers Construction Company. Filed October 10th, 1910. File No. 22,342.

/3

FILED.
MAR 28 1912
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1911.

No. [redacted]147.

SANTA FE, PRESCOTT AND PHOENIX RAILWAY COMPANY, A CORPORATION,
Plaintiff in Error,

vs.

GRANT BROTHERS CONSTRUCTION COMPANY,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

MOTION TO AMEND WRIT OF ERROR BY ADDING THE NAME OF NATIONAL SURETY COMPANY AS A PLAINTIFF IN ERROR.

ALSO BRIEF FOR PLAINTIFF IN ERROR IN OPPOSITION TO MOTION TO DISMISS AND IN FAVOR OF MOTION TO AMEND WRIT OF ERROR.

ROBERT DUNLAP,
PAUL BURKS,
Attorneys for Plaintiff in Error.

GUNTHORP - WARREN PRINTING CO., CHICAGO

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 410

SANTA FE, PRESCOTT AND PHOENIX RAILWAY COMPANY, A CORPORATION,
Plaintiff in Error,

vs.

GRANT BROTHERS CONSTRUCTION COMPANY,
Defendant in Error.

MOTION TO AMEND WRIT OF ERROR BY ADDING THE NAME OF NATIONAL SURETY COMPANY AS A PLAINTIFF IN ERROR.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

And now comes Santa Fe, Prescott and Phoenix Railway Company, a corporation, plaintiff in error, above named, by Robert Dunlap and Paul Burks, its attorneys, and moves the court to amend or permit the amendment of the writ of error in the above cause by adding the name of National Surety Company, a corporation, as an additional plaintiff in error, upon the following grounds and for the following reasons, to-wit:

This action was originally brought by the Construction Company, defendant in error, as plaintiff, against the Railway Company, plaintiff in error, as sole defendant, in the District Court of Maricopa County, Arizona, to recover for alleged loss of a grading outfit which was being transported by the Railway Company under a special contract for the construction and extension of its railroad; and on May 11, 1909, plaintiff recovered against the defendant Railway Company a judgment for $9,061.00, with interest, and with costs amounting to $190.45. (Trans., 11.)

The Railway Company took an appeal to the Supreme Court of the Territory, giving a supersedeas bond. On April 2, 1910, the Supreme Court of the territory affirmed this judgment, and further ordered and adjudged that appellee recover from the Railway Company and the National Surety Company, a corporation, surety on the supersedeas bond, the sum of $9,061.00, with interest, together with costs in the Supreme Court of $39.85, and costs in the court below. (Trans., 54.)

The alleged judgment against the surety was without notice to it and, under the Arizona practice, it is not in such cases regarded as a party to the suit. (See *Hurst* v. *Lakin*, 114 Pacific, 950.)

The petition for a writ of error to this court was, therefore, filed in the Supreme Court of the territory in the cause as entitled therein without naming the surety as a party, in order to secure a review and reversal of the judgment of the Territorial Supreme Court against the Railway Company which is primarily liable thereon. (Trans., 68, 69.)

A writ of error to this court was allowed by an Associate Justice of the Territorial Supreme Court upon the aforesaid petition. (Trans., 75.)

On July 20, 1910, attorneys for the Construction Company accepted service of the citation and writ of error without objection. (Trans., 78.)

No objection was made in this court to any pretended defect in the writ of error until the present time when a motion noticed for April 15, 1912, has been served upon plaintiff in error to dismiss proceedings in error in this court because it is claimed the judgment of the Territorial Supreme Court sought to be reviewed purports to be a joint money judgment against the Railway Company and National Surety Company, as surety, and that the Surety Company is not made a party to the writ of error. This motion was not made until it would be too late to secure a new writ of error owing to the lapse of time and change to statehood of the territory.

It is respectfully suggested that the attorneys for the Railway Company, in filing their petition for a writ of error, had the right to rely upon the practice in the territory of not regarding the surety on the appeal bond as a party to the case; that the alleged judgment against the surety in the Supreme Court of the territory, made in pursuance of the territorial statute and without notice to the surety, is not and cannot be regarded as a final or conclusive judgment, as will be shown in the brief hereto attached; that said surety is not in any proper sense a party to the cause, but if this court should deem it advisable

or necessary that it should be named as a party to the writ of error, then in order to prevent a miscarriage of justice, leave to amend the writ of error should be granted; that defendant in error has slept upon its rights, if any, and it will not be prejudiced by an amendment of the writ of error; and that inasmuch as defendant in error has purposely remained silent and failed to move in time so as to permit plaintiff in error to sue out a new writ, plaintiff in error should not be unjustly prejudiced and should not have imposed upon it the payment of an unjust judgment without a review by this court on the merits; that it is primarily liable and would have to pay the judgment itself; that the Surety Company could only be held secondarily liable; that no joint execution has or can be awarded against the surety and the Railway Company upon the judgment in the Supreme Court as such judgment would have to be remitted to the District Court for entry and execution; that the alleged judgment is in substance and fact not joint, but severable, and the liability of the Surety Company only attaches upon failure of the Railway Company to pay the judgment of the District Court if finally affirmed.

Wherefore your petitioner prays that the writ of error to this Honorable Court be amended by adding the name of National Surety Company as additional plaintiff in error and that the motion to dismiss the writ of error be overruled so as to avoid and prevent a miscarriage of justice.

ROBERT DUNLAP,
PAUL BURKS,
Attorneys for Plaintiff in Error.

BRIEF IN OPPOSITION TO MOTION TO DISMISS AND IN FAVOR OF MOTION TO AMEND WRIT OF ERROR.

Motion to dismiss should be overruled.

There is no merit at this late date in the motion to dismiss the proceedings in error because the National Surety Company, surety on the appeal bond, and against whom a judgment purports to have been rendered by the Territorial Supreme Court, was not made a party to the writ of error. The objection to say the least is highly technical.

The judgment against the surety on the appeal bond rendered by the Territorial Supreme Court under the territorial statute (Par. 1592, p. 477, Revised Statutes of Arizona, 1901) cannot be regarded either as final or conclusive. It is rather in the nature of a judgment *nisi*, entered without notice and which, of course, might be attacked collaterally or set aside by the surety upon motion either in the Supreme Court, or in the District Court should it be remanded to that court, for execution upon the showing of any fact which might show the judgment to be erroneous, or which a surety might urge against liability. Thus it might be shown that the execution of the appeal bond was *ultra vires* of the company making it, or that it was in fact signed and filed without its authority.

A personal judgment rendered without notice or

service of some process is essentially lacking in due process of law. *It is not a judicial determination.*

Smith v. *Woolfolk,* 115 U. S., 143, 149.
Garfield v. *Goldsby,* 211 U. S., 249, 262.
Reynolds v. *Stockton,* 140 U. S., 254.
Seamster v. *Blackstock,* 83 Va., 332.

Of course, proceedings against the surety on the appeal bond may be of a summary nature, but to provide a hearing and to cut off defenses some notice is necessary before a personal judgment can be entered and no notice was given.

The Surety Company was never made a party to the pending case. It was not a party to the action in the District Court and, under the Arizona practice, it is not regarded as a party to the cause in the Supreme Court in such sense that it would have to join in a writ of error to reverse the judgment.

Thus in *Hurst* v. *Lakin,* 114 Pacific, 950, the Supreme Court of Arizona held that, where a judgment was entered in the District Court, in a case appealed from a justice's court, against the defendant jointly with the sureties on his appeal bond, the defendant might prosecute the appeal to the Supreme Court alone, since judgment was entered against the sureties without notice and as a matter of course; that they were in no sense proper parties to the suit below; and that while the statute contemplated an appeal by all parties who were parties interested in the controversy, such requirements did not extend to the sureties on appeal bonds. In the opinion Chief Justice Kent, said:

"(1) It is the general rule that, in the ab-

sence of any statutory provision permitting appeals by one party, all parties to the action having a direct interest in the litigation, against whom a joint judgment is entered, must join in the appeal. (2) In many jurisdictions this rule is made to apply to the sureties on a forthcoming bond or upon an appeal bond, unless there has been a severance of the parties in interest, effected by summons and severance or by an equivalent proceeding appearing in the record. *Under the statutes of this territory, judgment is entered against sureties upon both classes of bonds without notice and as of course. They are in no proper sense parties to the suit in the court below, and are not heard therein.* It is true that they are parties to the judgment. The statutes regulating practice upon appeal contemplate appeal or proceeding in error only by those parties entitled to be heard in the trial court. *One of the reasons given for joining on appeal parties litigant in the ordinary case of an action upon a bond is that a reversal of the judgment as to the principal does not operate as a reversal as to the sureties. This reason is not applicable as to sureties of this class; for, although there is no technical reversal as to them, the reversal of the judgment as to their principal operates to discharge their liability, inasmuch as their contract is merely to pay the judgment against the principal.* It has never been the rule of this court to require such sureties to join in an appeal, and to hold so in this instance would effect an entire change in our procedure. Decisions of other courts as to their procedure upon appeal are not controlling upon us. We hold that, while all the parties who are parties in interest to the controversy must, of course, be joined as appellants, or some procedure had in the district court equivalent to summons and severance, such rule should not be extended to apply to the sureties on appeal or forthcoming bonds."

This construction should be followed by this court.

English v. *Territory of Arizona*, 214 U. S., 359.

Albright v. *Sandoval*, 216 U. S., 331.

Again, the judgment of the Territorial Supreme Court was in substance several and not necessarily joint. That is evidently the view of the Territorial Supreme Court in the above case. In the first place, it affirms the judgment of the District Court which was against the Railway Company alone. It then proceeds, without notice to the surety, to *further* adjudge a recovery from the Railway Company and also the Surety Company. But the alleged judgment judgment against the Surety Company is not final or conclusive against it. In reality its liability is only secondary, while that of the Railway Company is primary. *No joint execution is directed to be issued.* The judgment would have to be remitted to the District Court for entry and execution, and in such court the surety would be in position to attack the same, or indeed, to attack it collaterally. The judgment rendered against the surety on the supersedeas bond is merely a formal compliance with a requirement of the territorial statute. The judgment of the Territorial Supreme Court, therefore, under the circumstances is in *substance* and in law severable in such a sense as to permit the Railway Company, who was the real and only defendant, to sue out the writ of error.

Hanrick v. *Patrick*, 119 U. S., 156, 163, 164.

The case of *Estis* v. *Trabue*, 128 U. S., 225, is not in point. In that case a joint judgment was rendered

The New York 104 Fed. 561, 3 (C.C.A. 6th Cir.)
Perriam vs. Pac. Coast Co. 133 Fed. 141 (CCA. 4th Cir.)
The Glide 72 Fed. 200 (C.C.A. 4th Cir.)

in the United States Circuit Court against the claimants in attachment and the sureties upon their forthcoming bond and joint execution awarded. On page 229 the court says:

> "There is nothing distributive in the judgment, so that it can be regarded as containing a separate judgment against the claimants and another separate judgment against the sureties, or as containing a judgment against the sureties payable and enforceable only on a failure to recover the amount from the claimants; *and execution is awarded against all of the parties jointly.*"

The judgment against the surety in this case is not conclusive, but merely tentative, and may be attacked by it as rendered without any notice. So it is regarded under the Arizona practice.

Motion to amend writ should be granted.

But if this court should be of the opinion that the surety should be named as a party to the writ of error, it should certainly, in view of the Arizona practice, permit the writ of error to be amended under the provisions of Section 1005, United States Revised Statutes, reading:

> "The Supreme Court may, at any time, in its discretion and upon such terms as it may deem just, allow an amendment of a writ of error, when there is a mistake in the teste of the writ, or a seal to the writ is wanting, or when the writ is made returnable on a day other than the day of the commencement of the term next ensuing the issue of the writ, or *when the statement of the title of the action or parties thereto in the writ is defective,* if the defect can be remedied by reference to the accompanying record, and in all other particulars of form: Provided, the

defect has not prejudiced, and the amendment will not injure, the defendant in error."

It was because of the rather narrow and rigid ruling in some of the early cases in refusing to take cognizance of proceedings in error because of some defect in the writ of error that in 1872 Congress found it necessary to amend the provision in the judiciary act so as to read as above. The history of the amendment and the reasons therefor are set forth in *Walton* v. *Marietta Chair Company,* 157 U. S., 346, 347.

It was intended to authorize this court to permit an amendment of the writ of error in the furtherance of justice even where there was, through some oversight or other, a defect of parties either as to the plaintiffs in error or defendants in error.

Knickerbocker Insurance Co. v. *Pendleton,* 115 U. S., 339.

Pearson v. *Yewdall,* 95 U. S., 294, 296.

The City of Naples, 69 Fed., 794, 795 (C. C. A., 8th Cir.).

The above statute on amendments giving this court discretion to permit the same should not be narrowly or technically construed. It should be applied in the proper spirit. The amendment asked for can readily be made by reference to the accompanying record if it is deemed essential.

The case of *Inland, etc., Coasting Co.* v. *Tolson,* 136 U. S., 572, is in point and in all respects applicable. There it appeared that at a special term of the Supreme Court of the District of Columbia a judgment was rendered in favor of the plaintiff

against a sole defendant. The defendant appealed to the general term and gave sureties. The general term affirmed the judgment below and entered judgment against the defendant and against the sureties. The defendant sued out a writ of error to this judgment without joining the sureties. Defendant in error moved to dismiss the writ for the nonjoinder of the sureties and the writ was dismissed. Counsel for plaintiff in error then moved to rescind the judgment of dismissal and restore the case on the docket. The motion was granted and the writ of error amended by inserting therein, as plaintiffs in error, the names of the sureties. This was done under the authority of Section 1005, Revised Statutes.

Estis v. *Trabue,* 128 U. S., 225, was cited, but the point was made that in that case *execution was awarded against all the parties jointly.* Moreover, no application was in fact made in that case to amend the writ of error.

The Arizona attorneys may certainly be pardoned for relying on the Arizona practice in suing out a writ of error in an Arizona case. The purpose of the writ of error in getting the entire record into this court has been accompplished.

The case is such as should be reviewed.

Very briefly and without full or extended argument we wish now to show that this is an appropriate case for review and that the judgment complained of is erroneous and without merit, so that the motion to amend the writ of error should be granted in order that the case may be fairly considered and justice done.

The facts involved are few and simple and may be here accepted as practically stated in the submission of the case to the jury (Trans., 43, 44), and in the opinion of the Territorial Supreme Court. (Trans., 48, 49, 50.)

Plaintiff brought suit against the Railway Company as a common carrier to recover damages for loss by fire of a grading outfit. An agreement between plaintiff and the Railway Company was attached as an exhibit to the complaint and relied upon. (Trans., 3, 4, 5.) This was an agreement covering the construction of an extension or a branch to the defendant's railroad from a point known as "A. & C. Junction," about twelve miles north of Phoenix westward to the Colorado River. The Construction Company agreed to do the construction work, the Railway Company agreeing to furnish water delivered in cars at the end of the track, and to haul supplies to the end of the track, and to haul the contractor's camp and grading outfit and supplies at a special rate per ton mile, and return to original shipping point on completion of the work, "all movements of goods at less than tariff rates to be at consignee's risk of loss and damage." This agreement was further extended by letter and acceptance to cover additional grading, in which it was provided: "Free haul of men and supplies can only apply between A. & C. Junction and the end of the track; that the company shall assume no obligation or risk in case of accident or damage to men and supplies." (Trans., 8.)

On the completion of this construction work the grading outfit was loaded into several cars at the

end of the track, hauled to a station on the newly constructed line known as "Bouse," and there put into a train of other cars to be taken to Phoenix. But owing to congestion of the yards at Phoenix, when this train arrived at A. & C. Junction several cars containing a part of the grading outfit were set out on a sidetrack at said Junction. At this point there was no station or station agent, nor does there appear to have been any habitations. The foreman of the Construction Company, who was returning on the train with some of the laborers, left no one in charge of the cars. Through some cause unknown during the night time the cars and material loaded therein were destroyed by fire. The court submitted the case to the jury to determine whether defendant was negligent in leaving the cars at this point and whether such negligence was the cause of the loss or damage. It instructed the jury that defendant was liable as a common carrier and that as such it could not contract against loss resulting through its negligence.

In the first place, it will be seen that the Railway Company was not acting in its capacity as a common carrier; that it was hauling the grading outfit under and by virtue of its construction contract made with the plaintiff in order to provide for the construction or extension of its railroad. The contract was voluntarily entered into by the Construction Company, which agreed to assume all risks. It was one for the mutual benefit of the parties. It was not a case in which the Construction Company was merely in the attitude of a shipper and in which it was bound to accept transportation on such terms as the Rail-

way Company as a common carrier might dictate. The case is rather analogous to those special agreements covering the transportation of circus outfits, or covering transportation of express messengers and matter of express companies. In such cases, as in the case at bar, where the Railway Company was contracting for the construction of its railroad, it does not assume the relation of a common carrier, but may validly insist upon such terms as the other contracting party may be willing to accede to.

Baltimore & Ohio Southwestern Ry. Co. v. *Voigt*, 176 U. S., 498, 514 *et seq.*

A number of other cases might be cited, but this one will be sufficient to show that the point is well taken,—that the Railway Company was not acting as a common carrier and that, therefore, its agreement under which the Construction Company assumed the risks was valid and binding. Indeed, as shown by the ruling of the Interstate Commerce Commission, referred to in the opinion of the Supreme Court, under the Interstate Commerce Law, the provisions of which were also in force in that territory, the Railway Company could not have lawfully made a special agreement giving a shipper a special rate while acting in the capacity of a common carrier, but that it would be lawful for it as a part of its construction contract with a contractor, to agree to haul supplies and construction outfit, either free or at any special rate or figure that might be agreed upon; this because the contractor is acting as an agency of the Railway Company and does not

stand in the attitude of one of the general public demanding as of right a service from the Railway Company by virtue of its public undertaking.

Again, it is obvious that there was no evidence to justify the submission of the case to the jury even upon the ground of negligence. It is not shown what caused the fire. The mere fact that the Railway Company set the cars out on this sidetrack was not the cause of the loss or damage. The fact that there was no agent at this place was not pertinent. The very fact that there was no habitation at this point rather tended to show that it was a safe place to leave the cars, at least so far as any danger from fires might be concerned. For aught that may appear the fire may have been caused by something put into the car with the camping outfit by the contractor. The probability of a fire or damage resulting therefrom at that place was too remote and the court should, therefore, have given a peremptory instruction to the jury to find in favor of the Railway Company.

See:

Charnock v. *Texas & Pacific R. Co.*, 194 U. S., 432.

From this hasty summary of the case, we believe the court will be satisfied that it is an appropriate one in which to exercise its discretion in permitting the writ of error to be amended.

We, therefore, respectfully submit that the motion to dismiss the case in this court should be overruled and, if this court is of opinion that the surety should

also be made a plaintiff in error, that it is but just that the writ of error be allowed to be amended by adding the name of the surety as was done in *Inland, etc., Coasting Company* v. *Tolson*, and other cases, *supra*.

ROBERT DUNLAP,
PAUL BURKS,
Attorneys for Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM 1911.

NO. 410.

SANTA FE, PRESCOTT AND PHOENIX RAILWAY COMPANY, a corporation,

Plaintiff in Error.

vs.

GRANT BROTHERS CONSTRUCTION COMPANY, a corporation,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR, IN OPPOSITION TO MOTION TO AMEND WRIT OF ERROR.

In the motion to amend the writ of error, it is stated that the judgment against the surety was without notice to it.

The judgment was entered jointly against the plaintiff in error and the surety, under and in accordance with the very clear and specific provisions of the Arizona Statute requiring it to be so entered. When plaintiff in error gave the supersedeas bond and the surety became surety thereon, they did so with full knowledge of the statute requiring the entry of a joint judgment against them in the event of the action being decided by the appellate court of Arizona in favor of the plaintiff. The very purpose of giving a bond was to enable such a joint judgment to be entered in the event of the affirmance of the lower court's decision, after hearing in the appellate court. The statute is as follows:

Section 1592 of Revised Statutes of Arizona, 1901: "Whenever the supreme court, on the trial of a cause brought from any inferior court shall affirm the judgment or decree of such inferior court, or when said court shall proceed tc render such judgment or decree as should have been rendered by the court below, and such judgment shall be for the same or a greater amount, or of the same nature as rendered in the court below, said court shall render judgment against the appellant or plaintiff in error and his sureties on the appeal bond, a copy of which shall always accompany the transcript of the record; and said Supreme Court shall, in their discretion, also include in their judgment or decree such damages, not exceeding ten per cent of the amount of the original judgment, as the court may deem proper; and the judgment or decree of said Court rendered as contemplated in this Section shall be final."

The judgment, by its very terms, is joint, the language being as follows:

"It is further ordered, adjudged and decreed that the appellee herein do have and recover of and from the Santa Fe, Prescott & Phoenix Railway Company, a corporation, appellant herein, and National Surety Company, a corporation, surety on Supersedeas Bond herein, the sum of Nine Thousand and Sixty-one ($9,061) Dollars, with interest thereon at the rate of six per cent (6%) per annum from the 8th day of May, 1909, until paid, together with its cost in this court, taxed at thirty-nine and 85-100 ($39.85) dollars, and its costs in the court below in this cause incurred." Record, page 54.

It is suggested by counsel for plaintiff in error, in the motion to amend the writ of error, "that the attorneys for the Railway Company, in filing their petition for writ of error, had the right to rely upon the practice in the territory of not regarding the surety on the appeal bond as a party to the cause; * * *." As the attorneys for the Railway Com-

pany were engaged in preparing their case for hearing in the Supreme Court of the United States and not for hearing in any court of Arizona, it may well be inquired here whether they are to be excused from examining the practice of the Supreme Court of the United States, the statutes relating thereto, the decisions of the Supreme Court, the specific provisions of the statute of Arizona under which the judgment was entered, *and the terms of the judgment itself,* from which they were preparing to seek relief.

It is further stated by counsel for plaintiff in error that the surety company could only be held secondarily liable and that no joint execution can be awarded against the surety and the Railway Company, but there is a complete failure on the part of said counsel to verify this assertion.

Section 1592, supra, considered with Sections 1595 and 2557, Arizona Statutes of 1901, show clearly the nature of the judgment and the right to execution against both judgment debtors:

Section 1595. "When judgment is rendered on appeal or writ of error, it shall be certified by the clerk of the Supreme Court to the clerk with whom the judgment roll is filed. The clerk shall attach the certificate to the judgment roll and enter a minute of the judgment of the Supreme Court on the docket against the original entry, and return therewith the record in the case."

Section 2557. "The party in whose favor a judgment is given may at any time within five years after entry thereof have a writ of execution issued for its enforcement."

The case of Inland, etc., Coasting Co. vs. Tolson, 136 U. S., 572, is cited by counsel for plaintiff in error, in their brief in opposition to motion to dismiss and in favor of motion to amend writ of error. This case depended upon its own peculiar facts. There was no statute involved in that case requiring the entry of a joint judgment against the defendant and the surety. The supreme Court within a few months after the announcement of its decision in the case last above mentioned, re-affirmed the general rule, in the case of Mason vs. United States, 136 U. S., 581.

Yet more recently, the Supreme Court, considering this subject is in the case of Winters vs. U. S., and speaking through Mr. Justice McKenna, said:

"The rule which requires the parties to a judgment or decree to join in an appeal or writ of error, or be detached from the right by some proper proceeding, or by their renunciation, is firmly established." 207 U. S., 574.

The decision cited last above is conclusive, in view of the state of the record, and renders further comment upon the motions unnecessary, and it is respectfully submitted that the motion to dismiss the writ of error should be granted.

In view of the foregoing, no reply is made to that portion of the brief for plaintiff in error which relates to the merits of the cause. The question before the Court is one of jurisdiction.

A. C. BAKER,
ISIDORE B. DOCKWEILER,
EDWARD F. COLLADAY,
Attorneys for Defendant in Error.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911

No. 410

SANTA FE, PRESCOTT AND PHOENIX RAILWAY COMPANY, a corporation,

Plaintiff in Error.

vs.

GRANT BROTHERS CONSTRUCTION COMPANY, a corporation,

Defendant in Error.

ARGUMENT OF DEFENDANT IN ERROR ON MOTION TO DISMISS WRIT OF ERROR.

The facts which are essential to a proper understanding of the Motion to Dismiss the Writ of Error and which appear on the face of the record may be stated as follows:

The original suit was brought by Grant Brothers Construction Company against Santa Fe, Prescott and Phoenix Railway Company in one of the District Courts of Arizona

to recover damages for the loss of certain goods by fire, alleged to have occurred through the negligence of the railway company while the goods were in its hands for transportation. Transcript of Record, page 1-3. The plaintiff, Grant Brothers Construction Company, had judgment in the District Court for $9061.00 damages (Transcript of Record, p.p. 10-11), and the Santa Fe, Prescott and Phoenix Railway Company took an appeal from the judgment to the Supreme Court of Arizona and gave a supersedeas bond on appeal, with the National Surety Company, a corporation, as its surety on such bond. Transcript of Record, page 21. When the case came on for hearing in the Supreme Court of Arizona, that Court, under the provisions of Section 1592 of Revised Statutes of Arizona, 1901, entered a judgment against Santa Fe, Prescott and Phoenix Railway Company and its sureties on the supersedeas bond, the National Surety Company, for $9061.00.

Transcript of Record, page 54.

Section 1592 of Revised Statutes of Arizona, 1901, referred to above, is as follows: "Whenever the supreme court, on the trial of a cause brought from any inferior court shall affirm the judgment or decree of such inferior court, or when said court shall proceed to render such judgment or decree as should have been rendered by the court below, and such judgment shall be for the same or a greater amount, or of the same nature as rendered in the court below, said court shall render judgment against the appellant or plaintiff in error and his sureties on the appeal bond, —".

The present writ of error was sued out by Santa Fe, Prescott and Phoenix Railway Company to review the judgment of the Supreme Court of Arizona.

Transcript of Record, pages 78 and 79.

The court will observe that the judgment sought to be reviewed is joint and that one of the parties, National Surety Company, is not made a party to the writ of error.

The general proposition is familiar that in a writ of error to a judgment at law or an appeal from a decree in equity all the parties against whom the judgment or decree was entered must join in the writ of error or appeal, unless good reasons for non-joinder appear in the record by way of summons and severance or equivalent action. Williams vs. Bank, 11 Wheaton 414; Owings vs. Kincanon, 7 Peters 399; Todd vs. Daniel, 16 Peters 521; Wilson Heirs vs. Fire Insurance Co., 12 Peters 140; Masterson vs. Herndon, 10 Wallace 416; Fiedleman vs. Packard, 108 U. S. 14; Simpson vs. Greely, 20 Wallace 152; Hardee vs. Wilson, 146 U. S. 179; Inglehart vs. Stansbury, 151 U. S. 68; Davis vs. Trust Co., 152 U. S. 590; Hamrick vs. Patrick, 119 U. S. 156; Estis vs. Trabue, 128 U. S. 225; Mason vs. U. S., 136 U. S. 581.

This court very forcibly stated the proposition in the case of Estis vs. Trabue, supra, in the following language:

"But there is another difficulty in the present case, which cannot be reached by an amendment in or by this court under Section 1005. The judgment is distinctly one against the claimants, and C. F. Robinson and John W. Dillard, their sureties in the forthcoming bond, jointly, for a definite sum of money. There is nothing distributive in the judgment, so that it can be regarded as containing a separate judgment against the defendants and another separate judgment against the sureties, or as containing a judgment against the sureties payable and enforceable only on a failure to recover the amount from the claimants; and execution is awarded against all of the parties jointly. In such a case the sureties have the right to a writ of error. Ex parte Sawyer, 21 Wall. 235, 240. It is well settled that all the parties against whom a judgment of this kind is entered must join in a writ of error, if any one of them takes out such writ; or else there must be a proper summons and severance, in order to allow of the prosecution of the writ by any less than the whole number of the defendants against whom the judgment is entered. Williams v. Bank of the United States, 11 Wheat. 414; Owings v. Kincannon, 7 Pet. 399; Todd v. Daniel, 16 Peters 521; Smyth v.

Straders, 12 How. 327; Heirs of Wilson v. Life and Fire Ins. Co., 12 Pet. 140; Davenport v. Fletcher, 16 How. 142; Mussing v. Cavazos, 20 How. 280, 289; Sheldon v. Clifton, 23 How. 481, 484; Masterson v. Herndon, 10 Wall. 416; Hampton v. Rouse, 13 Wall. 187; Simpson v. Greely, 20 Wall. 152; Feibelman v. Packard, 108 U. S. 14. Where there is a substantial defect in a writ of error, which this court cannot amend, it has no jurisdiction to try the case. Heirs of Wilson v. Life and Fire Ins. Co., 12 Pet. 140. It will then, of its own motion, dismiss the case, without awaiting the action of a party. Hilton v. Dickinson, 108 U. S. 165, 168".

We do not see how the plaintiff in error can possibly hope to escape from the application of the principle, announced in the foregoing cases, to the writ of error in this case. The facts are not in dispute. The judgment sought to be reviewed is joint, it runs against both Santa Fe, Prescott and Phoenix Railway Company, and National Surety Company. The National Surety is not made a party to the writ of error. There is no suggestion of summons and severance or equivalent action in the record, where it must be evidenced if it existed at all. Inglehart vs. Stansbury, supra. In point of fact there was no such proceeding. It seems reasonably clear that in this state of matters the writ of error ought to be dismissed for want of jurisdiction in this court to try the case.

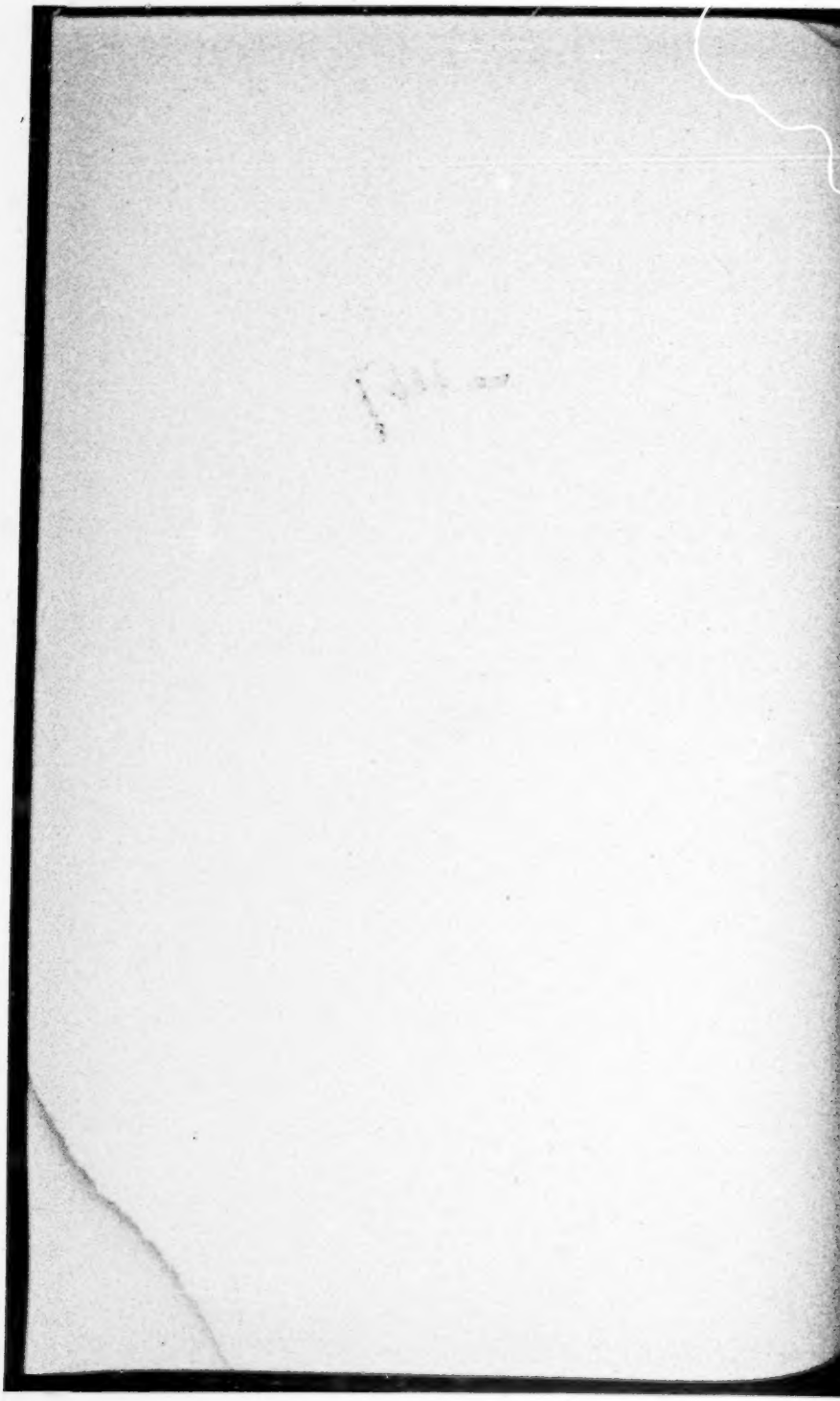
The Court in Inland Seaboard Coasting Co. vs. Tolson, 136 U. S. 572, allowed a writ of error to be amended by adding to the writ the names of the sureties, against whom the judgment also ran, but we do not construe that case as manifesting any intention upon the part of the court to depart from the rule frequently announced in the foregoing cases. It is not reasonable to give to a decision resting upon isolated or individual facts such sweeping construction as to overthrow a long line of adjudication upon the same subject. Within five months after the Tolson case the court in Mason vs. U. S., supra, again announced and enforced the general rule.

Walton vs. Marietta Chair Co., 157 U. S. 342, is illustrative of the character of cases where amendments to writs

of error should be allowed under the provisions of Section 1005 of the Revised Statutes of United States. They are cases where "the statement of the title of the action or parties thereto in the writ is defective", or where the defect, whatever it may be, "can be remedied by reference to the accompanying record". The evident intent of Section 1005 is to provide for defects of mere form whereas the omission of one of the joint parties to the writ is substantial and jurisdictional.

Enough has been said if not more than was necessary to present the point and we respectfully urge that the motion to dismiss the writ of error, with costs, in the case ought to be granted for the want of jurisdiction in this Court to try this case, and we ask that an order be entered to that effect.

A. C. BAKER,
ISIDORE B. DOCKWEILER,
Attorneys for Defendant in Error, Grant Brothers Construction Company.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911

No. 410

SANTA FE, PRESCOTT AND PHOENIX RAILWAY COMPANY, a Corporation,

Plaintiff in Error,

vs.

GRANT BROTHERS CONSTRUCTION COMPANY, a Corporation,

Defendant in Error.

MOTION TO DISMISS WRIT OF ERROR.

And now comes Grant Brothers Construction Company, a corporation, the defendant in error above named, by A. C. Baker and Isidore B. Dockweiler, its attorneys, and moves the Court to quash and dismiss with costs the writ of error taken herein by the above named Santa Fe, Prescott and Phoenix Railway Company, a corporation, upon the ground that this Court has no jurisdiction of the same, and because the judgment of the Supreme Court of the Territory of Arizona sought to be reviewed by said writ of error, is a joint money judgment and runs against said Santa Fe, Prescott and Phoenix Railway Company, a corporation, and National Surety Company, a corporation, and that the said National Surety Company is not made a party to said writ

of error and there has been no summons and severance or equivalent action to National Surety Company, a corporation; all of which is apparent upon the face of the printed transcript of record herein.

A. C. BAKER,
ISIDORE B. DOCKWEILER,
Attorneys for Grant Brothers Construction Company, Defendant in Error.

IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1911.
No. 410.

SANTA FE, PRESCOTT AND PHOENIX RAILWAY COMPANY, a Corporation,
Plaintiff in Error,

vs.

GRANT BROTHERS CONSTRUCTION COMPANY, a Corporation,
Defendant in Error.

NOTICE OF MOTION TO DISMISS WRIT OF ERROR.

Sir:

Please take notice that upon the copy of the judgment of the Supreme Court of Arizona, hereunto attached marked "Exhibit A", and which is also found at page 54 of the printed transcript of record herein, and upon the copy of the writ of error, hereunto attached marked "Exhibit B", and which is also found at pages 78-79 of the printed transcript of record herein, and upon all of the printed transcript of record herein and upon the printed argument, a copy of which is herewith served upon you, we shall, on Monday, the 15th day of April, 1912, and, if motions are not then heard, at the next succeeding motion day of this Court, make and submit to the Supreme Court of the United States, at a stated term thereof to be held in the Capitol in the City of Washington, District of Columbia, the motion, a copy of which is hereunto attached, and we shall also then and there move said Court to dismiss the writ of error herein for want of jurisdiction and because the judgment of the

Supreme Court of the Territory of Arizona sought to be reviewed by said writ of error is a joint money judgment against said Santa Fe, Prescott and Phoenix Railway Company, a corporation, and National Surety Company, a corporation, and that said National Surety Company is not made a party to said writ of error, nor has there been summons and severance or equivalent action to said National Surety Company, and that we shall then and there move for such other and further relief in the premises as may be just.

Phoenix, Arizona, March 12, 1912.

Yours, etc.,

A. C. BAKER,

ISIDORE B. DOCKWEILER,

Attorneys for Grant Brothers Construction Company, Defendant in Error.

To Robert Dunlap, Esq., Law Department, Atchison, Topeka and Santa Fe Railway Company, Railway Exchange, Chicago, Illinois.

"Exhibit A."

No. 1136.

SANTA FE, PRESCOTT AND PHOENIX RAILWAY COMPANY, a Corporation,

Appellant,

vs.

GRANT BROTHERS CONSTRUCTION COMPANY, a Corporation,

Appellee.

This cause having been heretofore submitted, and by the Court taken under advisement, and the Court having considered the same and being fully advised in the premises:

It is ordered that the judgment of the District Court be, and the same is hereby, affirmed.

It is further ordered, adjudged and decreed that the appellee herein do have and recover of and from the Santa Fe, Prescott and Phoenix Railway Company, a corporation, appellant herein, and National Surety Company, a corporation, surety on Supersedeas Bond herein, the sum of Nine Thousand Sixty-one ($9,061) Dollars, with interest thereon at the rate of six per cent (6%) per annum from the 8th day of May, 1909, until paid, together with its costs in this

court, taxed at thirty-nine and 85-100 ($39.85) dollars, and its costs in the court below in this cause incurred.

"Exhibit B."

WRIT OF ERROR TO THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

UNITED STATES OF AMERICA, SS.

The President of the United States to the Honorable Judges of the Supreme Court of the Territory of Arizona, Greeting:

Because in the record of proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the Territory of Arizona before you or some of you, between Santa Fe, Prescott and Phoenix Railway Company, plaintiff in error, and Grant Brothers Construction Company, defendant in error (a cause wherein a judgment rendered against said plaintiff in error for a sum in excess of Five Thousand Dollars, exclusive of costs, was affirmed by said Supreme Court of the Territory of Arizona), a manifest error hath happened to the great damage of said plaintiff in error, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, District of Columbia, on the 1st day of September, 1910, that the record and proceedings aforesaid being inspected, said Supreme Court may cause further to be done therein to correct those errors what of right and according to the laws and customs of the United States should be done.

Witness the Honorable John M. Harlan, Acting Chief Justice of said Supreme Court of the United States this 19th day of July, in the year of our Lord one thousand nine hundred and ten.

(Seal Supreme Court of Arizona.)

F. A. TRITLE, Jr.,
Clerk of the Supreme Court of the Territory of Arizona.

Allowed by EDWARD M. DOE, Associate Justice of the Supreme Court of the Territory of Arizona.

IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1911.
No. 410.

SANTA FE, PRESCOTT AND PHOENIX RAILWAY COMPANY, a Corporation,
Plaintiff in Error,

vs.

GRANT BROTHERS CONSTRUCTION COMPANY, a Corporation,
Defendant in Error.

AFFIDAVIT OF SERVICE OF NOTICE AND MOTION TO DISMISS WRIT OF ERROR.

STATE OF ARIZONA, }
County of Maricopa. } ss.

A. C. Baker, of Phoenix, Arizona, being first duly sworn, deposes and says; that he is one of the attorneys of record in this Court for Grant Brothers Construction Company, a corporation, the above named defendant in error; that on the 12th day of March, 1912, this affiant deposited in the United States Post Office at Phoenix, Maricopa County, Arizona, a copy of the motion to dismiss the writ of error, hereto attached, a copy of the notice of motion to dismiss the writ of error and thereto attached a copy of the judgment of the Supreme Court of Arizona and a copy of the writ of error herein, all of which is hereunto attached, also a copy of the printed argument of defendant in error on motion to dismiss writ of error filed in this case in this court; that all of said papers were enclosed in an envelope addressed to Robert Dunlap, Esq., who is the attorney of record in this Court for Santa Fe, Prescott and Phoenix Railway Company, a corporation, the above named plaintiff in error, at his place of business, to-wit: Law Department, Atchison, Topeka and Santa Fe Railway Company, Railway Exchange, City of Chicago, State of Illinois; and that affiant paid the postage in advance on said deposit of papers;

and that there is a regular communication by the United States Mail from said Post Office of Deposit of said papers as aforesaid, to said Robert Dunlap's said place of business; and that there will be ample time for said deposit to reach the said Robert Dunlap at his said place of business, in the due course of mail, for at least three weeks prior to the 15th day of April, 1912, the day fixed in said notice of motion for the hearing thereof, and further deponent sayeth not.

A. C. BAKER.

Subscribed and sworn to before me this 14th day of March, A. D. 1912.

S. C. KLECK,
Notary Public.

(Notarial Seal)

My Commission Expires Feb. 19, 1916.

FILED.
OCT 26 1912
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1912.

No. 147

SANTA FE, PRESCOTT AND PHOENIX RAILWAY COMPANY, A CORPORATION,

AND

NATIONAL SURETY COMPANY, A CORPORATION,

Plaintiffs in Error,

vs.

GRANT BROTHERS CONSTRUCTION COMPANY, A CORPORATION,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

ROBERT DUNLAP,
PAUL BURKS,
Attorneys for Plaintiffs in Error.

GARDINER LATHROP,
Of Counsel.

GUNTHORP-WARREN PRINTING CO., CHICAGO

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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1912.

No. 147

SANTA FE, PRESCOTT AND PHOENIX RAILWAY COMPANY, A CORPORATION,

AND

NATIONAL SURETY COMPANY, A CORPORATION,

Plaintiffs in Error,

vs.

GRANT BROTHERS CONSTRUCTION COMPANY, A CORPORATION,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF AND ARGUMENT OF PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

Plaintiffs in error seek to review and to reverse a judgment of the Supreme Court of the Territoy of Arizona (Trans., 54; 13 Arizona, 186; 108 Pacific, 457) which affirmed a judgment of the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa (Trans., 10), entered on a verdict of a jury awarding damages in the sum of $9,061 to defendant in error

(plaintiff and appellee below, and hereinafter referred to as the "Construction Company") in an action brought to recover damages for the destruction by fire of camp equipment and grading outfit of the Construction Company at A. & C. Junction, Arizona, on June 6th, 1907, through the alleged negligence of Santa Fe, Prescott and Phoenix Railway Company (defendant and appellant below, and hereinafter referred to as the "Railway Company").

In the year 1904 the Railway Company undertook to and thereafter did cause to be constructed the Arizona and California Railroad, a new line of railway extending from a point known as A. & C. Junction (which is about five miles north of the station of Wickenburg on the line which was then being operated) in a general westerly direction towards the Colorado River.

On or about November 23rd, 1904, the Railway Company gave out a call for bids (Deft.'s Ex. 7; Trans., 34) for the construction of a portion of said Arizona and California Railway, which it proposed to and afterwards did construct, manage and operate, the pertinent parts of which are as follows:

"SANTA FE, PRESCOTT & PHOENIX RAILWAY COMPANY.

Proposals will be received until noon of December 5th, 1904, at the office of the chief engineer at Prescott, Arizona, for the grading of the roadbed ready for ties, clearing right of way, making necessary canals, etc., of the Arizona and California Railway, from mile number eight, more or less, westward a distance of about forty (40) miles. * * *

Water will be delivered in cars at end of track at the rate of one dollar and fifty cents

($1.50) per one thousand (1000) gallons, and supplies will be hauled to end of track, both in the usual manner of construction trains, subject to delays, etc., incident thereto.

All risk of loss and damage to be borne by the contractor.

The railway company *will furnish a rate of one cent per ton mile from all points on the S. F. P. & P. road and leased road for the contractor on camp and grading outfit and supplies, corral supplies, etc., except explosives and commissary goods, and return to original shipping point at same rates, on completion of the work. All movements of goods at less than tariff rates to be at consignee's risk of loss and damage.*

The company will also furnish the contractor's employes to end of track from points on the S. F. P. & P. and leased lines, a rate of one cent per passenger mile and return those who have worked until the completion of contract at the same rate.

Passengers carried at less than passenger rates will be required to assume all risks of accident to persons and baggage. The plan of movement of these employes and freight is to be according to rules of the general freight and passenger agent.

The company will also secure for the contractor similar rates over the Santa Fe Company's coast lines, on camp and grading outfit in carload lots, both to and from the work, and for workmen going to the work in lots of five (5) or more." (Deft.'s Exhibit 7, Trans., 34-35.)

The Construction Company, a corporation, which was and for many years had been engaged in the business of grading, building and constructing railroad tracks, ways and beds, submitted a bid, in accordance with the foregoing call (Deft.'s Ex. 8; Trans., 35), and thereafter on December 12th, 1904, entered into a contract for the work (which was an-

nexed to and made a part of the complaint filed by the Construction Company) which set out *in haec verba* the provisions of the call for bids hereinbefore quoted. (Trans., 34-35.)

The contract so executed, which was for the grading of the easterly end of the new line from A. & C. Junction westward to mile 46, was subsequently extended to apply to the further construction of the Arizona and California Railway in a westerly direction, by a letter from the defendant Railway Company, to the Construction Company (Deft.'s Ex. 9; Trans., 36), accepted in writing across its face by the Construction Company, and containing, among other things, the stipulation following:

> "That the company shall assume no *obligation or risk* in case of accident to men and supplies * * *." (Trans., 36.)

The provision in the construction contract and the supplemental contract thereto providing for the free haulage or transportation of men and supplies, or haulage of any part thereof at special or reduced rates, was in accord with the rulings of the Interstate Commerce Commission announced in 12 I. C. C. R., pages 10 and 11, thus plainly indicating that the Railway Company was not considered as acting in its public capacity solely as a common carrier in the transaction, but rather in its private capacity as constructing a branch connection to its railroad and thereby making the Construction Company its agency in that respect. The construction contract was the only thing which lawfully justified the transportation of the contractor's property or grading

outfit from the place, in the manner, or at the rate at which it was carried and it should be assumed that the parties were dealing with each other in such manner as to act legally and not in violation of the Interstate Commerce Law.

The Construction Company completed the construction work, undertaken by its contract as thus extended, early in June, 1907; and, at the request of (Trans., 37) and solely for the convenience of the Construction Company, the Railway Company spotted some cars "at the front about twelve miles west of Bouse, between Bouse and Parker" to receive the camp equipment and grading outfit (Trans., 37), which were loaded by the employes of the Construction Company (Trans., 22-23), no one representing the Railway Company being present. (Trans., 24.) The cars were thus spotted for loading and loaded at a point west of and beyond the last station of the operated line (Bouse being the furthest point where the Railway Company was regularly operating (Trans., 37); and where, of course, in its capacity as a common carrier, the Railway Company was not obliged to receive any freight from anyone; and on June 5th, 1907, the Construction Company, by wire, requested the Railway Company to arrange to "have OUR cars taken to Bouse to connect with number twelve to-morrow." (Trans., 37.) The cars did not belong to the Railway Company, but had been obtained by it, at the special request of and solely for the convenience of the Construction Company, from the Southern Pacific Company (Trans., 37), on whose lines in Mexico the Construction Company was about to

commence work, in order to avoid transferring the goods to other cars (Trans., 38-24) and to facilitate handling them through the customs house. (Trans., 24.)

The request of the Construction Company for the movement of its cars was promptly carried out by a telegraphic order sent to Conductor Dignan to "go to A. & C. front to-morrow and get Grant Brothers outfit." (Trans., 39.)

The cars loaded at "the front," where there was no regular station (Trans., 37), were taken to Bouse, where powder and hay were unloaded therefrom (Trans., 25), after which they were cut into regular freight train No. 12. (Trans., 28.)

No bills of lading were issued to cover the cars (Trans., 24) containing the camp equipment and grading outfit, but way-bills to Phoenix (a point on the line operated by the Railway Company before the construction of the new line was commenced) were received at Bouse by Conductor Dignan (Trans,. 27-24), who proceeded with the cars to A. & C. Junction, where, at about 10:50 P. M. on June 5th, 1907, he set out on the side track ten cars (three empty and seven loaded, six of the loaded cars containing camp equipment and grading outfit belonging to the Construction Company, the seventh being a commercial car of ore) *because* the yard at Wickenburg, the next main line station of the Railway Company, was too crowded to receive them (Trans., 27), for which reason, only the commercial cars in the train and the cars containing the live-stock of the Construction Company (Trans., 28) were carried to Wickenburg.

A. & C. Junction was not an agency station, but there was a register box there in which Dignan deposited "dead freight way-bills" to indicate what cars were to be picked up by the next passing freight train. (Trans., ...) There was no water tank or houses there. It was open country. (Trans., 27.)

The agent of the Construction Company bought transportation at Bouse for about fifty regular day laborers and four foremen "at the contract price"; and, on the way to A. & C. Junction, these men, who were "all over the train as best they could accommodate themselves" (Trans., 28), were riding on the train with the general superintendent and camp foreman of the Construction Company, and the whole outfit was in their charge and control, but when it was found that the cars containing their outfit were to be set out at A. & C. Junction, they left no watchman with their cars, and no request for a watchman was made to any employe of the Railway Company by any superintendent, foreman or other employe of the Construction Company; nor did they so much as suggest leaving any one of their fifty, or more, men with the cars. (Trans., 27.)

Four cars, with the camp equipment and grading outfit of the Construction Company therein contained, were destroyed by fire on the morning of June 6th, 1907, cause unknown. (Trans., 29.)

On October 3rd, 1908, the Construction Company commenced an action in the trial court to recover $9,061 damages for the value of the property so destroyed by fire, and, after pleading in its complaint (Trans., 2) the construction contract of December

12, 1904 (Trans., 3), from which we have quoted those provisions essential to a determination of the question here involved, it alleged that the property so destroyed was delivered to the Railway Company as a common carrier at Bouse, Arizona, on the "line of said Arizona and California Railroad"; and

> "That in consideration of the tariff rate and price of one cent per ton mile to be paid for by the plaintiff, *as in said written agreement between the plaintiff and the defendant is stipulated and agreed,* the defendant then and there received the above described goods in its said capacity as common carrier *and pursuant to and in conformity with the said written contract* between plaintiff and defendant, to be by it safely carried over the lines of the said Arizona and California Railroad and the Santa Fe, Prescott and Phoenix Railway to Phoenix, Arizona, and there delivered to the plaintiff." (Trans., 2.)

The Railway Company, by its answer (Trans., 6-10), expressly denied that it was a common carrier with respect to the goods in question; alleged that it was a private carrier thereof (Trans., 9); and pleaded the supplemental contract by correspondence, whereby the Construction Company agreed "that the (Railway) Company shall assume no obligation or risk in case of accident or damage to men and supplies." (Trans., 8.)

Upon the trial, the Construction Company offered no evidence whatever in support of its allegation that appellant received the goods as a common carrier, or that the special low rate prescribed by the contract was a tariff rate. On the other

hand appellant proved by its general manager, Mr. Drake, that the rate was "very much less than the general public was charged for the transportation of commodities over the railroad line at that time. I couldn't say exactly how much, but it was probably a great deal less than was at that time charged by the defendant for the transportation over its lines of goods of the same character shipped by the public generally." (Trans., 36.)

And the learned presiding judge charged the jury, in substance, that the goods *were to be carried at "less than tariff rates," in pursuance of the contract.* (Trans., 44.)

The testimony showed that the four cars containing the goods in question were burning at about 10:10 A. M. when Engineer Reese, an employe of the Railway Company, passed the Junction (Trans., 30) with his train and only one other train had passed there that morning, and that between four and five o'clock (Trans., 30), and there was no evidence that any other train had passed there after the cars were set out. The undisputed evidence of the Railway Company showed that all of its passenger and freight engines which pass A. & C. Junction are oil burners and will not throw sparks (Trans., 41); furthermore, that all engines "drift" past the Junction, that is run without steam, so that there is nothing to carry sparks, even if there were any, out of the stack. (Trans., 41.) There is no evidence in the case that any combustible material was on or near either the main track or the side track; nor is there the slightest evidence as to the time when or the manner in which the fire started. The Construc-

tion Company did not pretend to have any theory as to the cause of the fire, much less to produce any evidence from which such cause could be inferred. The jury was left to pure guess or speculation on this vital question, and were practically told that they might predicate negligence upon the mere fact that the cars were set out a non-agency station without a guard being placed over them; whereas, the undisputed testimony in the case showed that, according to universal practice and the best known railroad usage under ordinary conditions, all other traffic has precedence over camp equipment and grading outfits of contractors, and, further, that it is never customary to place watchmen to guard cars which are set out at stations like A. & C. Junction (Trans., 37-39), and that the practice of setting out cars at such stations is general, well recognized everywhere and to be expected, and, though the vice-president of the Construction Company, its general superintendent and two of its camp foremen were present in court throughout the trial, none of them vouchsafed to deny or in any way to impair the force of this testimony that their goods were handled in strict accord with the correct and usual practice. The fact, therefore, stands admitted that the Railway Company did what all railroad companies do in handling and caring for the class of property here involved, and the failure either to ask for a watchman or to place one of its own employes in charge as watchman is conclusive proof that there was nothing in the situation to suggest to those in immediate charge of the property that there was the slightest necessity for a watchman.

The Railway Company insisted all through the trial, and now insists, that the burden was on the Construction Company to show by a preponderance of evidence that some negligence of the defendant was the proximate or efficient cause of the fire and the destruction of the property; and that the Construction Company signally failed to make any proof.

It will be observed from the foregoing summary that the uncontradicted evidence established the following important facts:

1. The property of the Construction Company was hauled from one point in the territory of Arizona to another point therein.

2. Such property was hauled under a special contract at much less than tariff rates; that is, at rates not found in any of the published tariffs of the Railway Company.

3. The property was hauled as a mere incident to and as part of the special contract, which was to construct for the Railway Company a part of a new and connecting line of road.

4. The property was not tendered to the Railway Company by the Construction Company as a part of the general public as commercial freight for carriage.

5. The property was not tendered to the Railway Company at a point where it was obliged in its character of public carrier to receive the same; but was tendered and loaded at a point where it had no station, and beyond the farthest point where the road had been opened for traffic.

6. The property was loaded by the Construction Company, no one representing the Railway Company being present, on cars not belonging to the Railway Company, but procured by it from the Southern Pacific Company at the special request of the Construction Company, to save the latter the necessity of transferring its property to other cars at Phoenix for haul by the Southern Pacific.

7. The property remained in the care and control of the general superintendent, camp foreman and forty workmen of the Construction Company on these special cars. The Railway Company did nothing but haul the cars so loaded.

8. These cars were set out on the side track at A. & C. Junction because regular freight which, according to universal and necessary practice, was given preference over special freight, filled the yard at Wickenburg, the next station en route, making it impossible to take these cars in there on the night of June 5, 1907.

9. These cars were sidetracked in accordance with regular, approved railroad practice under such circumstances. The practice has never been to place a watchman over cars so loaded and sidetracked.

10. Although the cars and property were in charge of said officers and men of the Construction Company, no request was made by any of them that the Railway Company leave a watchman at the Junction; nor did they leave one of their fifty available men in charge there.

11. There is no evidence of the cause of the fire. The jury were left to mere conjecture on this point.

In other words, there was not a scintilla of evidence on which they could find that any negligence of the Railway Company was the proximate cause of the fire, or in any way caused the same.

After the trial court had overruled the demurrer of the Railway Company to the complaint of the Construction Company, based upon the ground that the complaint did not state facts sufficient for a cause of action (Trans., 6-14), and after denying the motions made by the Railway Company to direct a verdict in its favor (Trans., 31-32) made first at the close of the plaintiff's case (Trans., 32) and again at the close of the whole case (Trans., 42), and after refusing certain instructions which are set out in our assignment of errors, the case was submitted to the jury under the instructions of the court (Trans., 42-45) (those portions whereof claimed to be erroneous being referred to *totidem verbis* in the errors hereinafter inserted and intended to be urged), and the jury returned its verdict (Trans., 10), upon which the judgment of the trial court (Trans., 10) was thereupon entered.

By its demurrer to the complaint, by its motions that the trial court direct a verdict in its favor, and by its motion for a new trial (Trans., 11), the Railway Company at all times maintained:

1. That it affirmatively appeared from plaintiff's complaint that the property of the Construction Company therein described, was being transported by the Railway Company solely by virtue of and pursuant to the terms of the special written agreement for the construction of the railway set out in the complaint.

2. That by the terms of that construction agreement, the Construction Company expressly agreed with the Railway Company that all movements of goods at less than the tariff rates should be at the Construction Company's risk of loss or damage, and that under no circumstances was the Railway Company to assume any obligation or risk in case of loss of or damage to such goods.

3. That it affirmatively appeared from the complaint and from the evidence that the Construction Company was the consignee of the goods, which, while being transported, were destroyed by fire; that such goods were being moved at less than the published tariff rates of the Railway Company, pursuant to the terms of the construction contract, "at consignee's risk of loss or damage."

4. That it affirmatively appeared from the complaint and from the evidence that, with respect to the transportation of the camp equipment and grading outfit of the Construction Company, the Railway Company was not acting as a common carrier but that it was, on the contrary, a private carrier or ordinary bailee with respect thereto, and acting only in its private capacity.

5. That it affirmatively appeared from the complaint and from the evidence that the Railway Company observed the same care and diligence with respect to the property of the Construction Company, which it was transporting, as it observed with respect to its own property of a like nature and value, namely, its cars which were set out at the place where the fire occurred.

6. That it did not appear, either from the pleadings or from the evidence, that the Railway Company failed or neglected to perform any duty which it owed to the Construction Company with respect to the transportation of the camp equipment and grading outfit, or otherwise, or that the Railway Company failed to perform any duty imposed upon it by the terms of the construction contract, or otherwise.

7. That even assuming that the Railway Company was a common carrier with respect to the camp equipment and grading outfit which it was transporting, still the contract, pursuant to which the goods were carried, in any event or view, expressly relieved the Railway Company from any liability for loss or damage which was not occasioned by its negligence; and that the burden was upon the Construction Company affirmatively to show negligence on the part of the Railway Company which was the proximate cause of the fire; and, as a matter of law, the Construction Company failed to show any such negligence or to produce any evidence as to the cause of the fire; and that, by reason thereof, the jury was left to mere conjecture and was furnished no evidence on which it could find that any negligence on the part of the Railway Company was the proximate cause of the loss.

Failing to maintain its position in the trial court, the Railway Company prosecuted an appeal to the Supreme Court of the Territory, which, by its opinion (Trans., 47-53), filed April 2nd, 1910, affirmed the judgment of the trial court, entered its judgment

(Trans., 54) against the Railway Company and against National Surety Company, as surety upon the supersedeas bond given by the Railway Company upon its appeal, pursuant to Section 1592, Revised Statutes of Arizona of 1901. On May 21st, 1910, the Territorial Supreme Court denied (Trans., 68) the motion for a re-hearing (Trans., 54-67) theretofore made by the Railway Company, which, within sixty days thereafter, by the filing of a proper petition and supersedeas bond, obtained on July 16th, 1910, a writ of error (Trans., 78-79) from an Associate Justice of the Territorial Supreme Court. (Trans., 75.)

The record herein was filed in this Court October 10th, 1910, prior to the admission of Arizona as a State, pursuant to the Act of Congress of June 20th, 1910, and the errors asserted and intended to be here urged are as follows:

Assignment of Errors.

That the Supreme Court of the Territory of Arizona erred in the particulars following, to-wit:

I.

In sustaining the ruling of the trial court denying the motion of appellant made at the close of all of the testimony to direct the jury to return a verdict for the appellant and against the appellee.

II.

In sustaining the ruling of the trial court in refusing to give the instruction numbered I requested by the appellant in the words and figures following:

> "The court instructs you to return a verdict for the defendant."

III.

In sustaining the ruling of the trial court in refusing to give the instruction numbered IV requested by appellant in the words and figures following:

> "The court instructs you that the effect of the covenant in the construction contract whereby the Construction Company agreed that, 'all movements of goods at less than tariff rates to be at consignee's risk of loss or damage' was to relieve the railway company for any liability for such loss or damage except when such loss or damage resulted from gross negligence on the part of the railway company or its employes."

IV.

In sustaining the ruling of the trial court in refusing to give the instruction numbered V requested by appellant in the words and figures following:

"The court instructs you that it was not negligence on the part of the Railway Company to leave the cars containing the camp equipment and grading outfit of the Construction Company upon the side track at A. & C. Junction without stationing a man at such side track to watch and guard such cars."

V.

In sustaining the action of the trial court in instructing the jury as follows:

"The important question of fact for you to determine in the case is whether or not this Railroad Company, in leaving these cars on that side track, was guilty of what is known in law as negligence."

VI.

In sustaining the action of the trial court in instructing the jury as follows:

"Now gentlemen, the first question for you to determine in this case before you get to the question of damages at all, is the question of negligence, because in this case the court leaves it to the jury to determine as a question of fact whether or not this Railroad Company was guilty of negligence in leaving the cars at this place, and then if it was so guilty of negligence, was that negligence the cause—the proximate cause—of this loss of goods. Now that question, which is the vital question in the case, the court leaves to the jury to determine as a question of fact."

VII.

In sustaining the action of the trial court in instructing the jury as follows:

> "By this contract the Railroad Company was not freed from any liability for loss if that loss was brought about by the Railroad Company's negligence, but it would be freed from liability for any other cause of loss. Therefore, the vital question in this case is to determine whether these goods were lost or destroyed by reason of the neglect of the Railroad Company. Because if they were not, Grant Brothers have to stand the loss. If they were lost through the Railroad Company's negligence, then the Railroad Company must stand it. Now the question of whether the goods were lost through the Railroad Company's negligence or not is one of fact for you to determine, and the burden of proving it is upon Grant Brothers Construction Company, the plaintiff in this case."

VIII.

In sustaining the action of the trial court in instructing the jury as follows:

> "Now the actual way in which this fire occurred is not shown by the testimony. The vital thing for you to determine is whether it was negligence on the part of the Railroad Company to leave the cars on this side track in the way they did under the circumstances in this particular case."

IX.

In sustaining the action of the trial court in instructing the jury as follows:

> "Now this is the vital issue in this case—this question of whether or not this act of the Rail-

road Company in leaving the cars on that side track under the circumstances in this case, was, or was not, negligence, and if it was negligence, did that negligence cause the fire."

X.

In sustaining the action of the trial court in instructing the jury as follows:

"So, gentlemen, you see after all it is a simple question for you to determine, for the circumstances surrounding this are practically admitted and the one vital question for you to determine is, was the one act of the Railroad Company in leaving the cars on the side track under the circumstances of the case negligent or was it not."

XI.

In sustaining and affirming the judgment of the trial court made and entered in the above entitled cause in favor of the appellee and against the said appellant.

ARGUMENT.

I.

THE PROVISION IN THE CONSTRUCTION CONTRACT UNDER WHICH, AS ONE OF THE TERMS THEREOF, THE RAILWAY COMPANY WAS TO TRANSPORT OR MOVE THE GRADING OUTFIT AND LABORERS NECESSARY TO PERFORM THE WORK WITHOUT ANY LIABILITY IN CASE OF LOSS OR DAMAGE, WAS VALID AND BINDING BECAUSE VOLUNTARILY ENTERED INTO WITHOUT ANY SORT OF COMPULSION, AND BECAUSE, IN RESPECT TO THE CONSTRUCTION CONTRACT AND MATTERS INCIDENTAL TO ITS PERFORMANCE, THE PARTIES WERE NOT DEALING WITH EACH OTHER IN THE RELATION OF COMMON CARRIER AND SHIPPER. ON THE CONTRARY, UNDER THE CONTRACT THE CONSTRUCTION COMPANY BECAME AN AGENCY OF THE RAILWAY COMPANY TO CARRY OUT OR PERFORM WORK WHICH THE LATTER MIGHT HAVE LAWFULLY DONE FOR ITSELF. THE STIPULATION INVOLVED WAS, THEREFORE, NOT VIOLATIVE OF ANY PUBLIC POLICY.

The original construction contract and the supplemental letter agreement, as will be readily seen, were prepared by laymen and not lawyers. The provisions thereof should, therefore, be read as popularly understood. While it may be that a stipulation in a bill of lading or shipping contract which is a one-sided document issued by a carrier as such, and in which the transportation is to be at the owner's risk, should ordinarily be strictly construed against the carrier because the parties do not deal at arm's length, the action of the shipper is not voluntary, and

the instrument is only sustainable by a construction not inclusive of the carrier's negligence, yet where such language is found in a mutual agreement for the benefit of both voluntarily entered into between the parties, and in which the Railway Company is not professing to act in its capacity as a common carrier, the language should be given a reasonably practical construction and such as the parties must obviously have understood. Thus, where one accepts and uses free transportation upon condition that it is to be at his risk, that includes necessarily any risk likely to be encountered whether arising from the negligence of the carrier's servants or otherwise. See:

McCawley v. *Furness Railway Co.*, L. R., 8 Queen's Bench, 57, 59, 60.

Gallin v. *London & Northwestern Ry. Co.*, L. R., 10 Queen's Bench, 212, 216.

Quimby v. *Boston &c Rld.*, 150 Mass., 365; S. C., 23 N. E., 205.

Payne v. *Terre Haute & I. Rld.*, 157 Ind., 616; S. C., 62 N. E., 472.

In the original agreement sued upon the Construction Company voluntarily agreed in respect to the hauling of supplies, etc., "*all* risk of loss or damage to be borne by the contractor," and further, "all movements of goods at less than tariff rates to be at consignee's risk of loss and damage."

In the supplemental contract made by letter and under which the outfit was in fact hauled at the time of loss it was expressly agreed "that the Company (meaning the Railway Company) shall assume *no*

obligation or risk in case of accident and damage to men and supplies." Such an informal statement is not susceptible to any other construction than that the Railway Company was to be entirely freed from any obligation or risk in case of accident or damage, however the same might occur.

It was undoubtedly the intent that in the movement of the grading outfit the Railway Company should be at no risk at all in case of loss or damage, but that all risk of such loss or damage should be borne by the contractor whether the same should result from accidental causes or from mere omissions or carelessness of the railway employes. The provision in question was not as heretofore stated inserted or found in any regular form of bill of lading put out to the public for general use and which might not be readily understood or appreciated. The provision was simply found in the proposal for bids put out by the Railway Company as the basis of a mutual agreement for the construction work, and was of course voluntarily assented to by the contractor as one of the terms and conditions of his bid for the work.

Notwithstanding the conflict in the authorities upon the question, we of course accept as conclusive in the discussion of this case the ruling of this court that a common carrier, acting merely in its capacity as such, may not validly stipulate, for exemption from responsibility for loss or damage caused by the negligence of such carrier or its servants, as against a mere shipper who as such would be entitled to demand in the given case the performance of the common law obligation of such carrier.

As rules of law are adopted by courts to meet the practical needs of the community, and should be applied in a practical way so as to avoid absurd consequences, we should, therefore, search for the practical rather than the artificial or technical reason for the adoption of the rule in question.

The reason for the adoption of the above rule of public policy outside of mere artificial technicalities is the practical one reiterated by Mr. Justice Gray in *Liverpool Steam Company* v. *Phenix Insurance Company*, 129 U. S., 441, as follows:

> "The carrier and his customer do not stand upon a footing of equality. The individual customer has no real freedom of choice. He cannot afford to higgle or stand out, and seek redress in the courts. He prefers rather to accept any bill of lading, or to sign any paper, that the carrier presents; and in most cases he has no alternative but to do this, or to abandon his business."

In such case, as in many others, where the parties dealing do not stand on a footing of equality but the one is in a position to oppress the other, courts have refused to countenance or enforce an unfair advantage and have held unreasonable or oppressive certain stipulations as contrary to public policy. In the case of common carriers acting solely in their capacity as such and required by virtue of their public calling to discharge their common law obligations or duties in favor of the public in general, courts have realized that to permit them to validly contract so as to release themselves from losses occasioned by their own neglect would in the end result in forcing upon the public such contracts as a general rule, and would, of course, result in a deterioration or demoralization of the general service.

But where the reason for the adoption of such apparently harsh or restrictive rule ceases, the application thereof also ceases and a different principle or rule of public policy comes into play, as announced by Sir George Jessel, M. R., in *Printing, etc., Company* v. *Sampson*, L. R., 19 Eq., 465, as follows:

> "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract."

Applying this latter rule this court, therefore, has held valid, and as not falling within the above rule restricting the rights of common carriers, a provision in a contract between a railroad company and an express company exempting the railway company from all liability for any loss, damage or injury to express matter or express messengers carried by the railroad company under such contract with the express company. See:

> *Baltimore & Ohio, etc., Ry. Co.* v. *Voigt*, 176 U. S., 498.

In such a case the express company and the railroad company were not dealing with each other merely in the capacity of shipper and common carrier, but the express company was securing advantages which the public as such were not entitled to

and was undertaking to perform upon the railway a part of the work which the railway company might itself have done. Thus the express company was rather utilized as an agency of the railway company and there was of course no reason why such parties could not bargain with each other for the best terms obtainable. In the opinion in the above case a number of authorities are cited as somewhat analogous, such as contracts with railway companies to move circus outfits, and also contracts with the Pullman Car Company for the hauling of its cars and employes. It is not necessary here to particularly refer to or cite those cases for they are commented upon in the opinion of this court in the above case. We will simply, in addition thereto, call attention to the following authorities:

New York Central, etc., Railroad Co. v. *Difendaffer,* 125 Fed., 895, C. C. A. Seventh Circuit, holding failure of Pullman porter to read a contract signed when entering his employment by which he assumed risks, did not vitiate the same;

M'Dermon v. *Southern Pacific Company,* 122 Fed., 671, 676, 678, upholding Pullman porter's contract releasing the railway company from liability for negligence;

Wilson v. *Atlantic, etc., Railroad Company,* 129 Fed., 781, 782, upholding contract releasing the railroad company from liability for negligence in the hauling of a circus outfit;

Chicago, etc., Railway Co. v. *Hamler,* 215 Ill., 530, again applying the rule to a contract between a sleeping car company and its porter.

In *Northern Pacific Railway Co.* v. *Adams*, 192 U. S., 440, 452, 453, the *Voight* case was cited with approval and it was held that a railway company might validly stipulate for exemption from liability for the death of a person riding on a free pass containing an appropriate provision against non-liability. Upholding the exemption against liability in such cases was considered by this court as not likely to induce negligence on the part of the railway company. In that case it was pertinently remarked: "Free passengers are not so many as to induce negligence on its part." It was further said in that case:

> "So far as the element of contract controls, it was a contract which neither party was bound to enter into, and yet one which each was at liberty to make, and no public policy was violated thereby."

We think it is safe to assert that in every case in which the matter was carefully considered and in which it was held that the exemption against liability arising out of negligence of the carrier was invalid was a case between a common carrier and a shipper acting solely in their respective capacities as such.

In the case at bar, however, it is apparent that the Railway Company was not acting or considered as acting merely in its public capacity, but was rather acting in its private capacity in securing the construction and completion of a branch line, a part of which only it was operating at the time of the loss.

It was alleged in the complaint (Tr., p. 2):

> "That said defendant in the like prosecution and pursuit of its said business of a common

carrier also owns, controls, runs, operates and manages a railroad running from the Colorado river, Arizona, to Wickenburg, Arizona, known and called Arizona and California Railroad Company, at which last named place or point the said Arizona and California Railroad connects with the said Santa Fe, Prescott and Phoenix Railway," etc.

And further:

"Defendant entered into an agreement with the plaintiff whereby the defendant agreed to carry and convey over the said railroads the camp and grading outfit and supplies belonging to the plaintiff and which plaintiff used and required in the prosecution and pursuit of its said business of grading, building and constructing railroad tracks, ways and beds for the consideration and at the rate and price of one cent per ton mile to be paid therefor by the plaintiff, a copy of which said agreement is hereunto attached marked 'Exhibit A' and made a part thereof."

It plainly appeared that the grading outfit, a part of which was destroyed by the fire, had been used for the construction of this railroad and was being hauled at the time under the special agreement sued upon.

This construction work it might have done itself and there exists no reason of public policy why the railway company might not validly agree with any other agency to perform all or part of the work, or why the work might not be apportioned among themselves. The railway company in its proposals specified what it would do in the furtherance of this work. Its agreement to haul the grading outfit and laborers and move the same from point to point as

the work progressed and required, and return the same, was but an incidental yet an essential part of the construction agreement. There was no compulsion whatever used. If the terms were not satisfactory the Construction Company was under no obligations to accept them or make its bid based thereon. It would be bad policy now after it received the benefits of the agreement to permit it to repudiate the terms or the conditions thereof. The agreement was one for the mutual benefit of the parties concerned, and the Construction Company secured rights under the agreement to which it would not otherwise be entitled. There is not presented a case in which a shipper and a common carrier were dealing merely in their relation as such, or in which the Railway Company sought to oppress or get an unfair advantage of the Construction Company.

The proposal for bids for the construction work which was the basis of the contract finally made and embraced in its terms, was not put out by the Traffic Department of the Railway Company seeking the business of transportation, but was put out by the Chief Engineer of the company in charge of construction and in order to make the necessary contract for the construction of the road of a subsidiary company whose connecting line of road was to be constructed for and was in fact operated, as constructed, by the Santa Fe, Prescott & Phoenix Railway Company. It covered only the hauling of laborers, material and outfit necessary for the work. When the cars, as loaded by the Construction Company at the end of the track, were hauled to Bouse, the terminus of the line which was then being oper-

ated, no bill of lading was issued, but the cars and outfit were hauled in pursuance of the construction agreement. It is true a "way bill" was made out, but that is a document which the station agent makes out containing instructions to the train conductor and other agents as to the handling, disposition or destination of the cars in the train or freight loaded in such cars. It is retained by the employes of the Railway Company for their own guidance and is not issued to shippers or others.

The result of the authorities is well summed up in Elliott on Railroads, Second Edition, Vol. 4, Section 1396, as follows:

> "A common carrier may by contract in particular instances become a private carrier, but a railroad company cannot escape the obligation which the law imposes upon it by insisting that a person who desires transportation for himself in the capacity of a private carrier, for where there is a duty to carry as a public or common carrier performance of that duty may be enforced. While a railroad company cannot by contract or otherwise change the nature of its public duties or obligations it may, where it is not under a duty or obligation to the public, contract to perform service in the character of a private carrier of goods or passengers. In other words, where there is a right to refuse to perform the services requested there is a right to contract for their performance in a different capacity from that which rests upon a railroad company as a public or common carrier."

In Section 1397, that author continues:

> "The considerations of public policy which are held to fetter the right to prescribe limitations upon the liability of a railroad carrier where it undertakes as a common or public car-

rier do not exist in cases where it has a right to contract to carry goods or passengers in the capacity of a private carrier, so that the company, where it undertakes to carry as a private carrier, may rightfully impose limitations that it could not impose if it were undertaking a duty resting upon it in its character of a common carrier. The authorities warrant the conclusion that a private carrier may effectively stipulate that it shall not be liable for injuries resulting from negligence."

The agreement of the Railway Company in question was to move the grading outfit on special terms not only over the portion of the line which it was operating, but also to points on the road which was being constructed and where the necessities of the work should require, though not open to general traffic. As a common carrier it was, of course, under no obligations to do this and the agreement shows that it was not dealing in its capacity as such.

Again, as showing that the Railway Company was not acting in its capacity as common carrier in undertaking to haul the grading outfit on special terms, we have the ruling or views of the Interstate Commerce Commission construing the Interstate Commerce Law governing "common carriers," the provisions whereof were at the time of this transaction in force in the Territories, including Arizona.

In the Matter of Railroad-Telegraph Contracts, 12 I. C. C. R., on page 11, the commission quoted and reiterated its former ruling, as follows:

"Nor does the commission construe the law as preventing a carrier from giving free or reduced rate carriage over its line to contractors for material, supplies, and men for use in con-

struction, improvement, or renewal work on the line of that carrier, provided such arrangements for free or reduced rate carriage are made a part of the specifications upon which the contract is based and of the contract itself."

Such ruling could of course be only sustained upon the theory that in making such contract the railway company was not acting in its capacity as a common carrier, but was merely acting in a purely private capacity seeking to have accomplished for it work which it might lawfully have done itself, and for which it might therefore have selected any agency it chose and make such terms with such agency as might be mutually agreed upon. Of the correctness of that ruling we entertain no doubt. Such contracts do not involve the public calling or undertaking of the railroad company, nor are they at all inimical to the public welfare. In order to secure the construction, extension or improvement of its railroad as cheaply as possible, it is essential that the Railway Company should be at liberty to make the best terms it can. The public are not prejudiced because shippers in general have no right to compel the making of such contracts, or the application of such terms, and they are not unlawfully discriminated against by reason of special terms being accorded to a single contractor who in fact undertakes to perform work for the Railway Company. Had full tariff rates been exacted, the bids for the work would have been increased to meet the difference, and such difference in the end would be borne by the Railway Company.

It is to be assumed, of course, that the parties in-

tended to act lawfully and not illegally. The contract under which the grading outfit was to be hauled to and from the work of construction as the same progressed would not be lawful if the Railway Company were to be regarded as acting in its capacity as a common carrier. It must be assumed, therefore, that the parties understood by virtue of their contract that they were not dealing together in the capacity or relation of common carrier and shipper.

The petition or declaration in this case charges the Railway Company, under the construction contract, as a common carrier; whereas it plainly appears that it was not acting in its capacity as a common carrier at all.

In 1 Hutchinson on Carriers, Third Edition, Sec. 60, it is said:

> "Even if a carrier should, in a particular instance, undertake by a special contract to carry goods by unusual and exceptional methods or routes, his liability would be based upon his contract and not by the ordinary rules governing common carriers."

If the Railway Company were to be held as acting in its capacity as common carrier then it is apparent that the plaintiff below seeks to recover as a party to an illegal arrangement and it would be contrary in such case to public policy to assist or permit it to recover under an agreement or arrangement under which it would be held to have deliberately violated provisions of the Interstate Commerce Law.

Plaintiff below secured under the construction contract special terms and rates for the movement

of its outfit. The custody of the Railway Company at the time of the loss was solely under and by virtue of that contract. Plaintiff below and the Railway Company were engaged in carrying out the arrangement agreed upon. It would be illegal for the Construction Company acting in the capacity of a shipper to bargain for or obtain from the Railway Company acting as a common carrier special rates or services different from those specified in the published tariffs of the Railway Company and open to the public in general.

C. & A. Rld. Co. v. *Kirby*, 225 U. S., 155.

If that arrangement were illegal the Construction Company would be regarded as much of a wrongdoer as the Railway Company and courts would decline to aid it to recover under or by virtue of such illegal contract or arrangement.

C. & A. Rld. Co. v. *Kirby, supra.*

Indeed the authorities go farther and hold that the court cannot lend its aid in any way to a party seeking to realize the fruits of an illegal contract, or arrangement.

Thus in *Continental Wall Paper Company* v. *Voight & Sons Company*, 212 U. S., 227, it appeared that a number of manufacturers situated in different states engaged in manufacturing an article sold in different states, organized a selling company through which their entire output was sold, in accordance with an agreement between themselves, to such persons only as would enter into a purchasing agreement by which their sales were restricted, the effect

As directly in point see particularly
Ellison vs. Adams Ex. Co.
245 Ill. 410.

of which was to restrain and monopolize interstate and foreign trade and commerce contrary to the Anti-Trust Act. It was held that no recovery could be had against the purchaser under such purchasing agreement because that would permit a party to realize the fruits of an illegal transaction.

In *United Shoe Machinery Company* v. *La Chapelle*, ... Mass., ...; 99 N. E., 289, decided by the Supreme Judicial Court of Massachusetts in July, 1912, it was held that the contract of one having a monopoly in shoe machinery with one employed by it to design and improve such machinery, the same that it makes with all others employed by it for such purpose, constituting 90 per cent. of those skilled in the manufacture of such machinery, that he shall assign to it all inventions made by him within ten years after termination of his contract of employment, was in direct aid of the monopoly of interstate trade and commerce, and therefore in violation of the federal anti-trust act, and no recovery could be had. The court there said:

> "Such a case is within the principle announced in *Continental Wall Paper Co.* v. *Voight & Sons*, 212 U. S., 227, 261; 29 Sup. Ct., 280; 53 L. Ed., 486, that the plaintiff comes into a court of equity for aid in enforcing a contract which according to the allegation and offer of proof was intended to be and was in fact an essential part of an illegal scheme."

If it was intended that plaintiff below, acting merely as a shipper, should have its property carried under an arrangement which it would be unlawful for it as such mere shipper to enter into by reason of the provisions of the Interstate Commerce Law, will not

that law be better enforced by refusing plaintiff relief because of the illegal advantage he sought to secure rather than permit him now to recover because or on account of a transaction, which if its position be correct, would be plainly violative of the Interstate Commerce Law?

In the Continental Wall Paper Company case, *supra*, this court quoted, on page 263, language used in a former decision, as follows:

> "To refuse to grant either party to an illegal contract judicial aid for the enforcement of his alleged rights under it tends strongly towards reducing the number of such transactions to a minimum. The more plainly parties understand that when they enter into contracts of this nature they place themselves outside the protection of the law, so far as that protection consists in aiding them to enforce such contracts, the less inclined will they be to enter into them. In that way the public secures the benefit of a rigid adherence to the law."

Of course it is not necessary to affirmatively plead the illegality, if any, for whenever it appears, whether from the evidence or otherwise, the court declines its aid.

Thus, in the Wall Paper Case above, on page 263, the language from a former opinion is quoted with approval, as follows:

> "Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract, and void for the same reason. Wherever the contamination reaches it destroys.

> The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation."

The claim of the plaintiff below, if sound, would be after all simply founded upon an illegal contract and to sanction a recovery would simply permit him to receive all the benefits of such contract and still retain the protection of the law. If he intrusted his goods to the custody of the Railway Company under an illegal agreement, and to secure the benefits thereof, he ought not to be heard to complain in case of their loss and the court should not aid him to recover damages.

We are aware of course of a disposition in courts at times to grant relief where plaintiff's right is not dependent upon showing the illegal contract or arrangement and where it would be apparently inequitable not to grant relief. They were generally cases in which the contract or transaction was not made criminal and punishable as such under the laws.

Thus in *Brooks* v. *Martin*, 2 Wall., 70, it was held that after a partnership contract confessedly against public policy had been carried out, and money contributed by one of the partners had passed into other forms,—the *results* of the contemplated operation completed,—a partner, in whose hands the profits were, could not refuse to account for and divide them on account of the illegal character of the original contract. Cases of that nature are founded upon a subsequent express or implied agreement to pay over the money.

The application of that case was, however, mate-

rially limited in the more recent case of *McMullen* v. *Hoffman*, 174 U. S., 639, where on page 656, it is pertinently stated:

> "Upon the point as to the ability of the plaintiff to make out his cause of action without referring to the illegal contract, it may be stated that the plaintiff for such purpose cannot refer to one portion only of the contract upon which he proposes to found his right of action, but that the whole of the contract must come in, although the portion upon which he founds his cause of action may be legal." (Citing cases.)

In *Embrey* v. *Jemison*, 131 U. S., 336, 348, although the action was upon four negotiable notes, the court would not permit a recovery to be had upon them, because the consideration for the notes was based upon a contract which was illegal.

If, therefore, it were held to be illegal to carry plaintiff's outfit on special terms or at special rates, it also follows that the obligation, custody and control of the Railway Company at the time of the loss was by virtue of such illegal arrangement or agreement. The plaintiff intrusted his property to the Railway Company to secure the benefits of such an agreement and could not, therefore, be heard to complain if it was lost through some oversight or omission of the Railway Company. Such contract if made between the Railway Company as a common carrier and a shipper, merely in their capacity as such, would be plainly prohibited by the provisions of the Interstate Commerce Law and punishable as a violation thereof.

But the very term of "common carrier" would be wholly inappropriate in the case at bar.

The third and seventh assignment of error should be sustained as well as the first and second assignments.

II.

IF, FOR THE SAKE OF ARGUMENT, IT BE ASSUMED THAT THE CONTRACT DID NOT IN LAW RELIEVE APPELLANT FROM LIABILITY FOR LOSS CAUSED BY ITS NEGLIGENCE, YET THE BURDEN WAS UPON APPELLEE TO SHOW BY EVIDENCE THAT SOME NEGLIGENCE OF APPELLANT WAS THE PROXIMATE CAUSE OF THE LOSS. THERE WAS A TOTAL FAILURE OF PROOF IN THAT RESPECT.

If it were assumed that the parties were acting merely in the relation of common carrier and shipper, and that a stipulation exempting the defendant from liability on account of its negligence would be invalid, yet inasmuch as under the agreement the shipper did assume all risk of loss and damage, and might be validly held to have assumed in any event all risk, except perhaps that caused by the defendant's own wrong ,it is clear that where the plaintiff claimed the loss was caused by the defendant's neglect the burden would be upon plaintiff to allege and make out by proof such a case.

Hutchinson on Carriers, Third Ed., Secs. 449, 1355.

Charnock v. *T. & P. Rly.,* 194 U. S., 432.

Crary v. *Lehigh Valley R. Co.,* 203 Pa. St., 525; S. C., 53 Atl., 363.

Indeed it is apparent from the early common law authorities that a common carrier might exonerate himself from liability for any loss not occasioned by

his actual misfeasance or gross negligence even in cases where the carrier sought to exonerate himself from liability by a mere notice.

Railroad Company v. *Lockwood,* 17 Wall., 372.

Indeed it is held in England that a railway carrier may be relieved by a shipper from liability for damage except upon proof that it arose from wilful misconduct on the part of defendant's servants.

Forder v. *Great Western Railway,* L. R. (1905), 2 K. B. Div., 532.

See, also:

Magnin v. *Dinsmore,* 70 N. Y., 410, 417, 418.

There would seem to be reason for not permitting a common carrier acting as such to excuse itself for its own direct wrongful acts, but there would not seem to be much reason for holding that it might not excuse itself by special agreement for some mere oversight or inattention on the part of its employes. However that may be, it is apparent that in any such case it is incumbent upon the shipper to allege and show that the negligence of the carrier was the proximate or direct cause of the loss.

In plaintiff's complaint we find it claimed in the sixth paragraph (Transcript, 2, 3) as follows:

> "That the defendant did not safely deliver and carry said goods, but on the contrary, *so negligently and carelessly misbehaved as such common carrier* in regard to the said goods and the same conveyance thereof, that by reason thereof the said goods were, on or about the 6th day of June, 1907, while they were in transit on

said Arizona and California Railroad from Bouse to Phoenix, and while they were in and upon the cars of said defendant and in its charge, burned and wholly destroyed by fire," etc.

In instructing the jury the trial court admitted there was no proof whatever as to the cause of the fire (see 8th Assignment of Error), yet, also admitting that the surrounding circumstances were undisputed or admitted, submitted to the jury the question whether the act of the Railway Company in leaving the cars on the side track, under the admitted circumstances, was negligence or not. (See 10th Assignment of Error.)

Between the setting out of the cars at the Junction and the fire there was no relation whatever of cause and effect. Side tracks are constructed and used for the purpose of temporarily stationing cars loaded or empty to meet the necessities of railroad operation and such placing of cars could not be regarded as improper. If the fire was caused by combustion due to some inherent quality of the goods loaded, defendant was not advised of such danger while plaintiff's agents would be, as they alone loaded the cars with plaintiff's property. On the other hand, if the fire was caused by some human agency it was not traced to any of defendant's servants acting in the line of their duty, and if started by strangers, was something defendant could not be expected to anticipate in such a place. There was evidently an intervening cause responsible for the fire other than the placing of these cars at the Junction.

The court refused to give defendant's request that

it was not negligence to leave the cars upon the side track at the A. & C. Junction without stationing a man at such side track to watch and guard such cars. (See 4th Assignment of Error.)

It was not shown or pretended that there was any likelihood of fires being started in that neighborhood or which were likely to come in contact with cars left upon the side track. There were no buildings about there which were inhabited and therefore no likelihood of fires being started by human agencies which would be likely to be communicated to the cars in question. It was not even pretended that the place was frequentel by "tramps." On the contrary, a desert country would not be apt to prove alluring to that class of irresponsibles.

The undisputed testimony was to the effect that it was not the practice or custom to station watchmen to watch or guard cars at such a locality.

Albert Duffield, trainmaster of The Atchison, Topeka and Santa Fe Railway Company, after testifying to his long railroad experience, testified:

> "During my experience in railroading, it has been the general practice to set out cars containing contractors' equipment and grading outfits on side tracks at non-agency stations, especially when the occasion demands it. Where there is a side track or non-agency station it is put there for the purpose of setting out cars. The general practice is to set out such cars containing contractors' camp equipment and grading outfits without guards to watch them. During my experience I have never known of guards being placed over such cars—it is preposterous—I never heard of it. With reference to the cars set out at a non-agency station in an open

desert it is not the custom to place guards over them." (Trans., 39.)

On cross-examination, he testified:

"It is customary for railroads to side track on an open desert, miles from any habitation, without any water available to extinguish a fire, goods, wares and merchandise shipped over the road and without placing a guard over them. If we could determine beforehand the act of God we might put such a guard over them, but this we cannot provide against. I do not think that a guard is necessary to protect the cars against burglary, persons inimical to the railroads or others and to place such guards is not the general practice. It has never been the custom to set guards over cars which were set out on side tracks under similar conditions as the cars containing plaintiff's outfit were set out at A. & C. Junction." (Trans., 39, 40.)

A. & C. Junction is less than four miles from Wickenburg.

Mr. Drake, defendant's general manager, testified:

"In all my experience in railroading, extending over thirty years, I have never known of a case where railway watchmen were placed to guard and watch cars containing construction equipment which happened to be placed at non-agency stations." (Trans., 37.)

"From my long experience as a railroad man I know that under ordinary conditions all other traffic has preference over these outfits. There were no extraordinary conditions with respect to the movement of plaintiff's outfit which would make the general rule non-applicable. With respect to the handling of plaintiff's goods we followed the general practice which I knew to have existed all over the country for many years and to be at that time and we never have, and it is not customary to place watchmen to

guard cars which are set out at such stations as A. & C. Junction." (Trans., 38.)

The above testimony was not controverted.

Although the construction outfit had been loaded by the Construction Company's employes and was in a sense in the charge of its superintendent and foreman, no objection whatever was made to setting out some of the cars at the Junction, and no suggestion that a watchman or guard should be left in charge of the same. It is not the practice to guard cars at any station during the night time except possibly in large towns or cities to prevent depredations from thieves who congregate therein. But in the locality in question there was no likelihood of fires being originated by human agencies which would endanger the cars. Even if an agent had been located at this point it could not be expected that he would watch or look after such cars during the nighttime. But failure to station a watchman at that place to guard the cars was not negligence. It was not the usual practice to do so.

Pike v. *C., M. & St. P. Ry.*, 40 Wis., 583.

There was no act or omission on the part of the Railway Company which was shown to be likely to have caused the fire in question. Leaving the cars upon the side track at this Junction merely created a condition, but was in no sense the cause of or likely to be the cause of the loss in question.

The decision of this court in *Charnock* v. *Texas & Pacific Railway Co.*, 194 U. S., 432, is, in its main features, analogous and controlling upon the question of negligence. It was there held that a car-

rier was not chargeable with negligence in failing to take precautions to guard against danger from fire to cotton located in box cars and standing upon its side track in the open country where the carrier was merely following a practice which had continued for years without any resulting loss or complaint. In that case it was specifically alleged and contended that it was negligence to leave the cotton in the cars upon its tracks in the open country unguarded and unwatched by the company, that tramps frequented the locality, and that under the law of Louisiana the burden of proof was upon the defendant to show the absence of negligence. In the case at bar there was not even such an allegation of alleged negligence and indeed it was not submitted to the jury by the court upon such a contention. The jury were permitted to guess as best they could.

Whether there is reasonable evidence that the negligence charged is the proximate cause of the injury complained of is a question of law.

Metropolitan Ry. Co. v. *Jackson*, L. R., 3 App. Cas., 193, 198, 199, 200.

Southern Pac. Co. v. *Pool*, 160 U. S., 440.

Seymour v. *Union Stock Yards, etc Co.*, 224 Ill., 579.

The question of proximate cause becomes a question of law where the casual connection of defendant's alleged negligence with the loss or damage complained of is evidently not proximate.

Hobbs v. *London & S. W. Rly. Co.*, L. R., 10 Q. B., 111, 122.

Goodlander Mill Company v. *Standard Oil*

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It was so treated by this court in the *Charnock* case *supra*.

Also,

Cau v. *Texas & Pac. Rly. Co.*, 194 U. S., 427.

Such ruling is necessary for certainty in the law.

In *Rothchild* v. *Northern Pacific Ry Co.*, ——— Wash., ..., 123 Pac., 1011, it was held that the negligence of a railroad company in carrying high proof spirits with a barrel in a broken condition was not the proximate cause of a fire destroying the spirits which originated in some way after the consignee had taken possession and consignee's agents were entering the car to remove the goods. In that case the carload had been placed for unloading. Consignee's employes entered the car for such unloading and almost immediately after such entering the contents of the car burst into flames and were entirely destroyed. The court was unable to determine what was the immediate cause of the spirits breaking into flame. The contents of the car or inside of the car were in fact then in a highly inflammable condition owing to the condition of one of the barrels of spirits both from fumes and from spilled contents of the broken barrel.

In *Stone* v. *Boston, etc, Company*, 171 Mass., 541, it is pertinently said:

> "One is bound to anticipate and provide against what usually happens and what is likely to happen, but not against what is unusual and

unlikely to happen or what is remotely and slightly probable."

In a well considered opinion in that case it appeared that defendant's railway depot, freight house and platform, used mostly for storing oil, was situated across the street from plaintiff's buildings; that the platform had become thoroughly saturated with oil leaking from barrels; that a teamster not connected with defendant brought goods to be shipped by it, and in lighting his pipe threw a match on the ground underneath the platform which immediately caught fire and with it the oil standing on the platform, destroying plaintiff's buildings as well as those of defendant. The oil had been on the platform for a longer time than 48 hours, which was prohibited by law. Plaintiff's buildings would probably not have been burned if there had been no oil on the platform. Yet it was held that a fire resulting from leaving the oil on the platform could not be apprehended by defendant and its acts not being the proximate cause of the fire, plaintiff could not recover.

In the subsequent case of *Glassey* v. *Worcester Consolidated Street Ry. Co.*, 185 Mass., 315; S. C., 70 N. E., 199, a by-law of the town forbade persons to leave obstructions of any kind in the highway without a written license from the road commissioners; it also appeared that a street railway company left a reel which had held feed wire lying on its side in an untraveled portion of the highway, and some boys rolled it down the street, striking plaintiff's carriage and injuring her; held, the negligence, if any, of the company in leaving the reel in

the highway, was too remote to entitle plaintiff to recover.

To the same effect see:

Kreigh v. *Westinghouse, Church, Kerr & Co.*, 152 Fed., 120 (C. C. A., 8th Cir.).

Cole v. *German Savings, etc., Society*, 124 Fed., 113.

P. H. & F. M. Roots Company v. *Meeker*, 165 Indiana, 132; S. C., 73 N. E., 253.

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Pollock on the Law of Torts, p. 36.

Upon any one of the foregoing grounds being sustained it is evident that the Railway Company was entitled to a peremptory instruction to the jury to return a verdict in its favor. Refusal to give such instruction was plainly error. The judgment should be reversed with instructions to grant a new trial.

Respectfully submitted.

ROBERT DUNLAP,
PAUL BURKS,
Attorneys for Plaintiffs in Error.

GARDINER LATHROP,
Of Counsel.

Supreme Court, U. S.
FILED.
JAN 6 1913
JAMES H. McKENNEY,
Clerk.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1911.

Santa Fe, Prescott and Phoenix Railway Company, a corporation,

Plaintiff in Error,

vs.

Grant Brothers Construction Company, a corporation,

Defendant in Error.

No. 147.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

Brief and Argument of Defendant in Error.

ISIDORE B. DOCKWEILER,
A. C. BAKER,
Attorneys for Defendant in Error.

Parker & Stone Co., Law Printers, Los Angeles, Cal.

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No. 410.

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IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

Brief and Argument of Defendant in Error.

May It Please the Court:

The plaintiff in error urges in this court that the railroad company was not a common carrier of the goods destroyed, and, that being true, the construction contract, under which the goods were carried, lawfully might and did exempt the railroad company from all liability for loss,

though occasioned by the railroad company's negligence; finally it is insisted, even be it assumed that the contract would not in law relieve the railroad company for loss caused by its negligence, that there was a total failure of proof to show that some negligence of the railroad company was the proximate cause of the loss.

Controverting these contentions the defendant in error asserts:

1. The railroad company (plaintiff in error) was a common carrier of the goods destroyed, and hence, could not by contract absolve itself from liability to the defendant in error from its acts of negligence. Though the soundness hereof be denied, nevertheless,

2. The contract of carriage did not in terms exempt the plaintiff in error from liability for its acts of negligence, and, therefore, the exemption contracted for was from loss occasioned by the dangers naturally incident to the carriage, and not from those brought about by the carrier's negligence.

3. The determination of the question of negligence was properly submitted to the jury.

We beg to discuss the questions in the order so presented.

I.

The Railroad Company Was a Common Carrier of the Goods Destroyed, and Hence, Could Not by Contract Absolve Itself from Liability to Defendant in Error from Its Acts of Negligence.

It is conceded (which is indeed trite) that the railroad company could not, as a common carrier, cast off the duty imposed by law and contract for immunity from its acts of negligence. However, a common carrier may by contract relieve itself from liability as an insurer; likewise, a private carrier owing no duty to the public, may contract for immunity even for its very negligence. In the case at bar the liability of the railroad company is predicated upon acts of negligence in the transportation of the goods of the defendant in error. That the railroad company undertook the carriage of the goods of the defendant in error, destroyed by fire, as a common carrier appears evident. The construction contract, of which the contract of carriage was a part, was entered into by the plaintiff in error, the Santa Fe, Prescott and Phoenix Railroad Company, and the defendant in error. The contract concerned the grading and construction of the road-bed of the Arizona and California Railway Company, a subsidiary of the plaintiff in error. We quote the pertinent part of the contract [Trans. Rec. p. 5]:

"15. The company will furnish a rate of one cent per ton mile from all points on the S. F. P. & P. Road and leased roads for the contractor, on camp and grading outfit and supplies, etc., except explosives and commissary goods, and return to original shipping points at same rates, on completion of the work. All movements of goods at less than tariff rates to be at consignee's risk of loss and damage.

"16. The company will also furnish the contractor's employees * * * a rate of one cent per passenger mile * * * and return those who have worked until completion of contract at the same rate. Passengers carried at less than tariff rates will be required to assume all risk of accidents to person and baggage. THE PLAN OF MOVEMENT OF THESE EMPLOYEES AND FREIGHT IS TO BE ACCORDING TO THE RULES OF THE GENERAL FREIGHT AND PASSENGER AGENT.

"17. The company will also secure for the contractor similar rates over the Santa Fe Company's coast lines, on camp and grading outfit, in carload lots, both to and from the work, and for workmen going to the work in lots of five (5) or more."

This contract was by letter of the General Superintendent and Chief Engineer of the plaintiff in error [Trans. Rec. p. 8] extended to cover additional work not included in the original contract. This letter, which became a part of the original contract, provides:

"Your company (defendant in error) will continue the grading westward to the Colorado River under the same terms and conditions of the contract which existed. * * * The Arizona and California Railway Company will deliver water by the car load at the end of track

free of cost except for car hire, and that the Arizona and California Railway Company will also haul men and supplies to the end of the track free * * * the free haul of men and supplies can only apply between A. and C. Junction and the end of the track; that the company shall assume no obligation or risk in case of accident or damage to men and supplies."

Did the contract, and the consequent acts and conduct of the parties, impress upon the plaintiff in error, with respect to this shipment, the character of that of a private or a common carrier? If a common carrier with respect thereto, then, though the carriage was by special contract, it remained a common carrier still.

> "It is argued that a common carrier, by entering into a special contract with a party, for carrying his goods or person on modified terms, drops his character and becomes an ordinary bailee for hire, and, therefore, may make any contract he pleases. That is, he may make any contract whatever, because he is an ordinary bailee; and he is an ordinary bailee because he has made the contract.
>
> "We are unable to see the soundness of this reasoning. It seems to us more accurate to say that common carriers are such by virtue of their occupation, not by virtue of the responsibilities under which they rest. Those responsibilities may vary in different countries, and at different times, WITHOUT CHANGING THE CHARACTER OF THE EMPLOYMENT."
>
> Railroad Co. v. Lockwood, 17 Wall. 376.

"A common carrier is such by virtue of his occupation, not by virtue of the responsibility under which he rests. Even if the extent of these responsibilities is restricted by law or by contract, THE NATURE OF HIS OCCUPATION MAKES HIM A COMMON CARRIER STILL."

Liverpool etc. St. Co. v. Phx. Ins. Co., 129 U. S. 397.

"A common carrier receiving goods for transportation under a special limitation of liability is a common carrier still."

Mears v. N. Y., N. H. & H. R. Co., 75 Conn. 171, 96 Am. St. Rep., p. 192.

We submit, that the true test to be applied in determining whether or not a carrier assumes the duties and responsibilities of a common carrier, is that applied by the territorial Supreme Court, adopting Mr. Hutchinson's test.

"1. He must be engaged in the business of carrying goods for others as a public employment, and must hold himself out as ready to engage in the transportation of goods for persons generally as a business, and not as a casual occupation. 2. He must undertake to carry goods of the kind to which his business is confined. 3. He must undertake to carry by the methods by which his business is conducted and over his established road. 4. The transportation must be for hire. 5. An action must lie against him, if he refuses without sufficient reason to carry such goods for those who are willing to comply with his terms."

1 Hutchinson on Carriers, Sec. 48 (3d Ed.).

In the carriage under consideration each of these characteristics definitely appears and fully meets the test.

1. That the plaintiff in error was engaged in the business of carrying goods for others as a public employment is admitted. Its answer [Trans. Rec. p. 7] "admits that it is a railroad corporation duly organized and existing under and by virtue of the laws of the territory of Arizona, and that it was, at all of the times mentioned in plaintiff's complaint, and is now, a common carrier of goods, freight and passengers for hire."

2. The plaintiff in error undertook to carry goods of the kind destroyed. The goods were miscellaneous merchandise, such as railroads usually carry and are under obligation to the public to carry. The plaintiff in error had an established tariff rate for the like commodities; its general manager, a witness in its behalf, testified:

"A rate of one cent per mile per ton is very much less than the general public was charged for the transportation of commodities over the railroad line at that time. I couldn't say exactly how much less, but it was probably a great deal less than was at that time charged by the defendant for the transportation over its lines *of goods of the same character* shipped by the public generally."

This rate of one cent per ton per mile did not include explosives and commissary. The contract expressly excludes explosives and commissary goods. As a common carrier it owed no duty to the defendant in error or to the public to carry explosives, but such duty existed as to the remainder of the goods. Therefore, it conclusively appears that the plaintiff in error had a regular rate for the carriage of the particular kind of goods destroyed and that it held itself out to the public as a common carrier thereof. This fact alone, holding itself out as a common carrier of the class and kind of goods destroyed by having an established rate or tariff for its carriage, inviting the public to ship and transport over its lines goods of this kind, clearly established the character of the plaintiff in error to be that of a common and not of a private carrier.

3. The plaintiff in error undertook to carry by the methods by which its business was conducted and over its established road. The contract provides: "The plan of movement of these employees and freight is to be according to the rules of the General Freight and Passenger Agent." The rate of one cent per ton mile was effective under the contract "from all points on the S. F. P. & P. Road and leased roads." Fitly the Supreme Court of Arizona has interpreted the word point in the contract: "The word

'point' would by a fair construction mean station or point where appellant was doing its regular business as a common carrier." [Trans. Rec. 57.] The plan of movement, the method of transportation, was to be according to the rules of the General Freight and Passenger Agent of the plaintiff in error. Surely, the usual methods of transportation were contemplated. Much stress is laid upon the fact that the cars upon which these goods were loaded belonged to the Southern Pacific Company, but this is wholly immaterial. The defendant in error made a request for cars, and cars were furnished to it by the plaintiff in error. As a matter of convenience and courtesy the plaintiff in error heeded the request of the defendant in error and interchanged cars with the Southern Pacific Company to avoid the necessity of again unloading and reloading in the intended transportation into Mexico. But, as stated by the Supreme Court of Arizona, "the acts made obligatory on the appellee by the contract are to be considered in this connection rather than acts that may have been voluntarily performed by it." [Trans. Rec. 57.] Furnishing a particular kind of car to the defendant in error was a matter of voluntary performance. The contract does not specify a particular kind of car, and supplying Southern Pacific cars was a mere matter of courtesy rather than of obligation. It does not change the re-

lation any more than if the plaintiff in error had heeded the request for flat or box cars.

The fact that the cars were loaded twelve miles west of Bouse "at the front" becomes wholly immaterial when it is considered that the loss occurred after the cars had been received by the plaintiff in error and had become part of its regular train as contemplated, and that the cars were at the time of the loss part of the regular train. What the relation was before the cars were turned over to the plaintiff in error, became part of its regular train, at a station of the plaintiff in error, is a mere academic question. The loss occurred at a time when the defendant in error by the very terms of the contract had ceased to exercise any control over its own goods. For, after the cars containing the goods of the defendant in error became part of the regular train and were part of the latter's regular train and by it carried for hire, the "plan of movement was according to the rules of the General Freight and Passenger Agent" of the plaintiff in error.

4. The transportation was for hire; "one cent per mile per ton" was the agreement. An express agreement to carry for hire independent of, and severable from, the contract of construction. Whatever quantity of camp and grading outfit and supplies might be used by the defend-

ant in error and tendered to the plaintiff in error the latter agreed to carry at one cent per ton per mile.

5. That the plaintiff in error owed an actionable duty to the defendant in error to transport the latter's goods of the class and kind destroyed is beyond question. Independent of the special contract, can it be denied that the plaintiff in error was bound to carry the goods of the defendant in error from Bouse, from which latter point the goods were way-billed and transportation for the passengers purchased? For the like commodities the plaintiff in error had an established rate, had invited the public to ship, Bouse was one of its regular stations, a point on its road, and the plaintiff in error was bound to carry the goods destroyed. Independent of the special contract the defendant in error must needs have paid the regular tariff rate, a higher rate, but the *quantum* of compensation does not, and cannot, change the character of the plaintiff in error. For if by contract for a less rate than the general rate, the carrier could so change its character, it could in all cases, by giving a special rate absolve itself from liability for its acts of negligence. "So long as they are compensated they are common carriers, contract or no contract."

1 Hutchinson on Carriers (3d Ed., Sec. 4).

The relation of common carrier having been shown to exist, the plaintiff in error is subject to, and controlled by, the law of a common carrier. Under that law, established as "a settled rule of policy" (B. & O. S. W. Ry. Co. v. Voigt, 176 U. S. 498; The Kensington, 183 U. S. 263) it could not absolve itself from liability for its acts of negligence. A settled rule or policy, of law, cannot be arbitrarily disregarded, merely, because the reason which prompted the formulation of the rule may not in every later case be patent. The plaintiff in error was a common carrier; in its business it undertook to carry the goods of the defendant in error over its road for hire; these goods it was bound, even independent of contract, to carry; surely, it did not divest itself of its character as a common carrier. A common carrier may become a private carrier when,

> "as a matter of accommodation or special engagement, he undertakes to carry something WHICH IT IS NOT HIS BUSINESS TO CARRY."
>
> Liverpool & G. W. S. Co. v. Phx. Ins. Co., 129 U. S. 397.

> "When there is a right to refuse the services requested, there is a right to contract for their performance in a different capacity from that which rests upon a railroad company as a public or common carrier."
>
> 4 Elliott on Railroads, pp. 11, 12.

"A common carrier may, however, undoubtedly become a private carrier or bailee for hire, when as a matter of accommodation or special agreement, he undertakes to carry something which it is not his business to carry."

1 Hutchinson on Carriers, Sec. 44.

"There was no evidence that the railroad company had ever carried similar goods for Wallace before in HIS OWN PRIVATE CARS, or that it had ever carried or held itself out to carry goods in that manner for others, and there is no presumption that railroad companies would do so. We know from common observation that they do not hold themselves out as common carriers OF WILD AND DOMESTIC ANIMALS TO BE TRANSPORTED IN THE PRIVATE CARS OF THE OWNERS, and loaded in a manner agreeable to the owners; persons, animals, horses and other property being carried upon the same train, WHICH IS OPERATED AT IRREGULAR TIMES AND SEASONS, AT THE CONVENIENCE OF THE OWNER OF SUCH CARS.

"No common carrier undertakes to carry every species of property, in respect to which they have not held themselves out as common carriers."

C. W. & St. L. R. Co. v. Wallace, 66 Fed. 506.

A railroad company is not a common carrier of circus trains, of express cars, or indeed of every species of property. Hence, we find, that, when there "is a right to refuse the service requested, there is a right to contract for their

performance in a different capacity." The carrier, not then being a common carrier, falls not within the purview of the policy of law. Upon this principle the Voigt case (express messenger), the Wallace case (circus trains) and similar cases are decided. In the Voigt case (quoting from the Express Cases, 117 U. S. 1) it is said:

> "But it is neither averred in the bills, nor shown by the testimony, that any railroad company in the United States has ever held itself out as a common carrier of express companies, that is to say, as a common carrier of common carriers."

Would the decision in the Voigt case have been the same if the contract between the railroad company and the express company had provided that the railroad company would furnish a special rate of one cent per mile to messengers traveling, on its regular trains and cars, from one point on the line of its road to another, in going to or returning from work? We trust that the illustration makes evident the distinction between the Voigt case and the case at bar.

It is insisted by the plaintiff in error that the defendant in error was but an agency in the doing of construction work which the plaintiff in error could itself have performed, and, that the contract of carriage was but incident to the main object of the contract. No doubt, the plaintiff in error could itself have performed the con-

struction work and, no doubt, the main object of the contract concerned the doing of construction work. But how can this change the character of the plaintiff in error to that of a private carrier, all the elements determinative of its character as a common carrier being present? When the construction work was completed the plaintiff in error was bound to carry the goods of the defendant in error independent of the contract in the manner and by the methods actually employed. The special contract only afforded the defendant in error a special rate, but, if it saw fit to employ the plaintiff in error to carry its goods it was bound to compensate the plaintiff in error, and "so long as they are compensated they are common carriers, contract or no contract."

The contract had for its principal object the construction of a subsidiary line of the plaintiff in error, it is true, but the contract of carriage was a distinct undertaking by the plaintiff in its character as a carrier for hire. The contract contained mutual and reciprocal undertakings of the parties. One of the undertakings of the plaintiff in error was that it would, for hire, and by its usual methods and over its established road, carry the goods of the defendant in error. It was a railroad corporation engaged in transportation of goods for hire, and within the line of its business it agreed to carry the goods of

the defendant in error for hire. There is nothing in the contract that it would carry the goods of the defendant in error as a private carrier or as a carrier in a capacity different from its ordinary occupation, and, except as limited by the contract, it must be presumed that it undertook to carry in its ordinary capacity as a common carrier. That it agreed to safely carry the goods, except as expressly limited by the contract, is part of the contract; that duty is imported into the contract.

TO HOLD THE RAILROAD COMPANY AS A COMMON CARRIER DOES NOT RENDER THE CONTRACT VIOLATIVE OF THE INTERSTATE COMMERCE LAW.

The vice in the argument of the plaintiff in error upon this question lies in the assumption of the premise that this contract of carriage, as a contract of carriage by a COMMON carrier, is inimical to and prohibited by the Interstate Commerce Act. This, however, is an assumption wholly unwarranted, in fact the express ruling of the Interstate Commerce Commission negatives the property of such an assumption.

Section 2 of the Interstate Commerce Act provides that if any common carrier shall

> "by any special rate, rebate, etc., charge, demand, collect or receive from any persons or person a greater or less compensation for any services rendered, or to be rendered, in the transportation of passengers or

property, subject to the provisions of this act, than it charges, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like and contemporaneous kind of traffic UNDER SUBSTANTIALLY SIMILAR CIRCUMSTANCES AND CONDITIONS."

Of the object of the act this court has said:

"The principal objects of the Interstate Commerce Act were to secure just and reasonable charges for transportation. To prevent unjust discrimination in the rendition of the services under similar conditions."

Interstate Commerce Com. v. R. R. Co., 145 U. S. 263.

The Interstate Commerce Commission expressly say:

"Nor does the Commission construe the law as preventing a carrier (common carrier) from giving free or reduced rate carriage over its lines to contractors for material, supplies and men."

12 I. C. C. R. 11.

The Interstate Commerce Commission in its decision referred to *common* carriers and not to *private* carriers, for neither the act of Congress nor the Commission concerns a *private* carrier.

The many authorities cited by the plaintift in error merely hold, that which is alphabetical, that if a contract be illegal a party thereto can not recover upon the contract; but none of the

authorities even intimate that a contract of carriage like the one at bar falls within the purview of the act of Congress. Furthermore, the plaintiff in error in its argument brushes aside the fact that this is an action *ex delicto* based upon negligence in the carriage of goods, and not an action of *assumpsit* (like Chicago and A. R. Co. v. Kerby, 225 U. S. 155, cited by plaintiff in error) in affirmation of the contract. We are not prepared to admit, nor indeed will this court hold, that even a shipment under a rate violative of the act of Congress would relieve the carrier from liability for its acts of negligence.

II.

THE CONTRACT OF CARRIAGE DID NOT IN TERMS EXEMPT THE PLAINTIFF IN ERROR FROM LIABILITY FOR ITS ACTS OF NEGLIGENCE, AND THEREFORE, THE EXEMPTION CONTRACTED FOR WAS FROM LOSS OCCASIONED BY THE DANGERS NATURALLY INCIDENT TO THE CARRIAGE, AND NOT FROM THOSE BROUGHT ABOUT BY THE CARRIER'S NEGLIGENCE.

This action is based upon the failure of the plaintiff in error to exercise ordinary care, negligence, in the carrying of the goods of the defendant in error. The exemption in the contract applicable to this particular carriage is found in paragraph 15 only:

"All movements of goods at less than tariff rates to be of the consignee's risk of loss and damage." [Trans. Rec. p. 5.]

And in that part of the supplementary letter [Trans. Rec. p. 8]:

"The company shall assume no obligation or risk in case of accident or damage to men and supplies."

Though this latter seems to refer to the free haul mentioned in the letter rather than to the carriage of goods at the reduced rate mentioned in the contract.

It is true that the parties dealt at arms' length, which is equally true of all carriages by special contract at reduced rate, for the shipper need not enter into a special contract at a reduced rate, by offering to pay the established rate the carrier can impose no terms; it is also true that the defendant in error became its own insurer, and it is not seeking to hold the plaintiff in error as an insurer. But, the carriage being for hire, did the contract absolve the plaintiff in error from all duty imposed by law and annexed to its calling? Did the defendant in error anticipate the want of ordinary care in the plaintiff in error and contract for immunity therefrom? Did not the defendant in error have the right to assume that the plaintiff in error would exercise ordinary care and be free from negligence in the carriage of the goods? The movements were at

consignee's *risk* of loss or damage. "Risk" is not spoken of negligence, of that caused by the carrier's own act, but of acts foreign to the carrier against which without a stipulation of exemption he would be an insurer. View the contract as one between parties fully occupying an equal footing, this cannot be denied: the exemption was inserted by the plaintiff in error for its own protection; though private or public carrier it was bound to the exercise of ordinary care; to claim immunity from the failure to exercise ordinary care, to relieve itself from a legal duty, from the operation of the law, it must be able to point out unerringly to such an exemption. The rule of construction that general words of exemption will not be given effect as including acts of negligence of the carrier was, no doubt, well known to the plaintiff in error; if it desired immunity from its acts of negligence, did not desire to be bound to the exercise of ordinary care, it should have been so written in terms that would leave no doubt as to the meaning of the parties.

> "The special agreement, in this case, under which the goods were shipped, provided that they should be conveyed at the risk of Harden; and that the respondents were not to be accountable to him or to his employers, in any event, for loss or damage.
>
> "The language is broad and general and might very well comprehend every description of risk incident to the shipment. But

we think it would be going farther than the intent of the parties, upon any fair and reasonable construction of the agreement, were we to regard it as stipulating for wilful misconduct, gross negligence, or WANT OF ORDINARY CARE."

N. J. St. N. Co. v. Bank, 47 U. S. 343.

"General words FROM WHATEVER CAUSE ARISING, may well be satisfied by limiting them to such extraordinary liabilities as carriers are under without fault or negligence on their part.

"When general words may operate without including the negligence of the carrier or his servants, it will not be presumed that it was intended to include it. Every presumption is against an intention to contract for immunity for not exercising ordinary diligence in the transaction of any business, and hence the general rule is that contracts will not be so construed, unless expressed in unequivocal terms."

Mynard v. Syracuse R. Co., 71 N. Y. 183.

"But such a stipulation will not be construed in any jurisdiction as exempting the carrier from liability for its own negligence unless such a construction is unquestionably required."

4 Elliott on Railroads, Sec. 1508.

"No contract, however, exempting the carrier from liability for losses or damage occurring from negligence will be implied from doubtful language. To have this effect where allowable at all, THE CONTRACT MUST SO CLEARLY AND EXPLICITLY INCLUDE LIABILITY FOR THE CONSEQUENCES OF NEG-

LIGENCE AS TO LEAVE NO DOUBT OF ITS MEANING AND INTENT. The contract must operate according to its terms; but when doubtful terms are employed, the general rule binding common carriers to a stringent liability will determine the construction, because when the carrier insists that an exemption has been created in its favor, the burden of showing it rests upon him; AND WHEN THE TERMS OF THE EXEMPTION ARE GENERAL AND CAN BE REASONABLY SATISFIED BY A LIMITED CONSTRUCTION, THEIR MEANING WILL NOT BE EXTENDED BEYOND SUCH REASONABLE LIMITS."

1 Hutchinson on Carriers (3d Ed.), Sec. 463.

Mr. Freeman in an extended monographic note in 88 Am. St. Rep. 68, p. 119, summarizes the uniform rule:

"THE LANGUAGE MUST BE SUCH AS NECESSARILY EVINCES AN INTENTION ON THE PART OF BOTH PARTIES THAT LOSSES ARISING FROM NEGLIGENCE SHALL BE INCLUDED, AND IS NOT TO BE DEDUCED FROM EXEMPTION IN GENERAL TERMS."

Whether common carrier or private carrier, the contract in the case at bar did not release the plaintiff in error from liability for loss caused by its own negligence, even if it could have contracted for such release. The defendant in error assumed only the risks naturally incident to the danger of transportation. The plaintiff in error is sought to be held liable in this action for its

acts of negligence and thereof the release or exemption does not speak.

III.

The Determination of the Question of Negligence Was Properly Submitted to the Jury.

Prefacing our argument upon this question, we desire to direct the court's attention to the fact that neither the question of negligence, nor whether such negligence was the proximate cause of the loss, properly arises upon this appeal. The motion for a directed verdict in favor of the plaintiff in error appears in full in the transcript of the record [pp. 31, 32]. The motion specified the grounds whereon it was based. An examination of the motion will disclose that it was based solely upon the pleadings and upon the theory that the plaintiff in error was by the contract released from all liability. This motion was denied by the court, and an exception thereto preserved. The motion, being limited to the pleadings and the contract, did not involve the question of negligence and proximate cause. It is true that thereafter the plaintiff in error submitted an instruction, amongst others, to return a verdict for the defendant. (Assignment of Errors II.) But, the plaintiff in error having submitted a motion for a directed verdict both at the close of the plaintiff's case and after the

close of all the evidence, and having "fully argued" the same, and that motion being limited to the pleadings and the contract, well might the trial court assume that the instruction was based upon the same ground; the later requested instruction was but a repetition of the motion. If the plaintiff in error desired to raise the question of negligence and proximate cause as a question of law from the facts, the motion for a directed verdict having specified the several grounds relied on, this question too should have been by the motion presented. Furthermore, no exception appears in the record to the refusal of the court to give the instruction, an exception having been taken, as stated, to the denial of the motion for a diected verdict both at the close of the plaintiff's case and at the conclusion of all the evidence.

Insisting, therefore, that the submission to the jury of the question of negligence and proximate cause does not properly arise for consideration, we beg to discuss the soundness of the action of the trial court.

The undisputed evidence with respect to the transportation of the goods in question is: The goods of the defendant in error were loaded "at the front" about twelve miles west of Bouse upon cars furnished by the plaintiff in error. The plaintiff in error knew these goods were to be moved over the Southern Pacific line and there-

fore the contractor asked that Southern Pacific Company's cars be furnished so the goods would not have to be reloaded into other cars at Phoenix. [Abs. Rec. 38.] After the cars were loaded "at the front" the cars were hauled to Bouse by the plaintiff in error and there billed to Phoenix, Arizona, and transportation for the employees purchased to Phoenix, both Bouse and Phoenix being on the line of the plaintiff in error, Phoenix being its southern terminus. At Bouse explosives and hay were unloaded, and the cars were then attached to the regular train, known as Number 12, of the plaintiff in error. The train was in the exclusive charge of the plaintiff in error, the employees of the defendant in error riding as passengers merely. Bouse was a regular station, having a station agent. The train consisted of fourteen cars. The A. and C. Junction is an intermediate point between Bouse, Wickenburg and Phoenix. At the A. and C. Junction ten cars, seven loaded and three empties, were switched on the sidetrack or spur of the plaintiff in error on which spur or sidetrack the cars were destroyed. "After leaving all of the cars containing Grant Brothers' outfit except the car of mules at A. and C. Junction we went on towards Phoenix." [Trans. Rec. 28.] The cars containing the outfit of the defendant in error were cut out of the regular train and sidetracked about 10:50 in the evening of June

5th, 1907; in the morning of the next day, between 4 and 5 o'clock, a passenger train passed the cars, and about 10 o'clock in the morning the cars were destroyed by fire. At the time the cars were so sidetracked the superintendent in charge for the defendant in error "spoke to the conductor at A. and C. Junction and asked him what he wanted to set them out there for." [Trans. Rec. 25, 27.] The reason given by the conductor was that they did not have room for them in Wickenburg. No reason other than this appears in the record why the cars containing the goods of the defendant in error were not carried through to Wickenburg and Phoenix. The A. and C. Junction was an open desert without a station agent or inhabitants residing there and without water or water tank or fire apparatus. No watchman was left to guard the cars.

Unless this court can say that these facts, cutting out of the regular train the cars containing the goods of the defendant in error and leaving them exposed for twelve hours on an open desert to dangers of every sort without hinderance, wholly abandoning the cars and surrendering its actual custody at a place totally uninhabited, where no fire apparatus existed and no water was available for the extinguishing of a fire, without a guard, does not, as a matter of law, show negligence; would not lead ordinary minds

to differ as to whether or not the plaintiff in error had exercised that degree of care and diligence which a reasonable and prudent man would exercise in the conduct of his own affairs; and unless this court can say that as a matter of law no inference of negligence could be drawn by the jury from these facts, only then is this court warranted in interferring with the finding of the jury. Well might it be claimed by the defendant in error that these acts constituted deviation, certainly however, this court cannot say as a matter of law that a reasonably prudent man would in the conduct of his own affairs leave his property exposed in an open desert, abandon his property in an open desert, at night time, exposed to the very dangers, amongst others, which befell these goods. The jury found by their verdict that the conduct of the plaintiff in error showed an absence of ordinary care; we do not believe that the verdict should be disturbed. This court cannot say that carriers, whether public or private, who have undertaken to carry for hire the goods of another, and by such undertaking have come into the custody of the property of another and are charged to the exercise of, at least, ordinary care in the safekeeping and carriage of the goods, may as a matter of law abandon the property, surrender the actual custody, in an open desert at its own pleasure and convenience, and take no

precaution to guard the property. Only if that right be found to exist as a matter of law, ~~and~~ can the absence of negligence be found as a matter of law. We respectfully submit, that the facts, far from showing an absence of negligence, conclusively show a wanton dereliction of duty by the plaintiff in error clearly impelling the verdict rendered.

> "What may be ordinary care in one case, may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. IT IS THEIR PROVINCE TO NOTE THE SPECIAL CIRCUMSTANCES AND SURROUNDINGS OF EACH PARTICULAR CASE, AND THEN SAY WHETHER THE CONDUCT OF THE PARTIES IN THAT CASE WAS SUCH AS WOULD BE EXPECTED OF REASONABLE, PRUDENT MEN, UNDER A SIMILAR STATE OF AFFAIRS, WHEN A GIVEN STATE OF FACTS IS SUCH THAT REASONABLE MEN MAY FAIRLY DIFFER UPON THE QUESTION AS TO WHETHER THERE WAS NEGLIGENCE OR NOT, THE DETERMINATION OF THE MATTER IS FOR THE JURY. IT IS ONLY WHERE THE FACTS ARE SUCH THAT ALL REASONABLE MEN MUST DRAW THE SAME CONCLUSION FROM THEM, THAT THE QUESTION OF NEGLIGENCE IS EVER CONSIDERED ONE OF LAW FOR THE COURT."
>
> Grand Trunk Ry. v. Ives, 144 U. S. 408.

> "As a general rule negligence is undoubtedly a question of fact, and as such is for the determination of the jury. That is, negligence being a breach of the duty to

exercise reasonable care under the circumstances, it is for the jury to consider all the surrounding conditions and say *whether the defendant's act or omission was or was not violative of this obligation.* It is the province of the jury to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable and prudent men under a similar state of affairs."

21 Enc. Law, 498.

The trial court instructed the jury:

"The important question of fact for you to determine in the case is whether or not this railroad company, in leaving these cars on that sidetrack, was guilty of what is known in law as negligence. Because, if they were guilty of negligence, as I shall define it to you, and these cars were destroyed by reason of their negligence, then they must respond in damages. * * * Now, gentlemen, the first question for you to determine in this case before you get to the question of damages at all, is the question of negligence, because in this case the court leaves it to the jury to determine as a question of fact whether or not this railroad company was guilty of negligence in leaving the cars at this place, and then if it was so guilty of negligence, was that negligence the cause—the proximate cause—of this loss of goods. * * * By this contract the railroad company was not freed from any liability for loss if that loss was brought about by the railroad company's negligence, but it would be freed from liability for any other cause of loss. Therefore, the vital question in this case is to determine whether these goods were lost or destroyed by reason of the neglect

of the railroad company. Because if they were not, Grant Brothers have to stand the loss. If they were lost through the railroad company's negligence, then the railroad company must stand it. Now the question of whether the goods were lost through the railroad company's negligence or not is one of the facts for you to determine, and the burden of proving it is upon Grant Brothers Construction Company, the plaintiff in this case. They must satisfy you by a preponderance of the evidence that the loss was caused by negligence of the railroad company, then you ought to award damages for the value of the goods; if you are not so satisfied by a preponderance of the evidence that the loss was caused by the negligence of the railroad company, then you ought not to award any damages at all, and you should, in that event, find for the defendant. * * * And the jury in this case, taking this as the definition of negligence, is to find from the facts surrounding the transaction in question, whether or not the defendant company has committed negligence; and if they so find and further find that such negligence was the proximate cause of the destruction of plaintiff's property by fire, then the verdict should be for the plaintiff." [Trans. Rec., pp. 43, 44, 45.]

If the facts warranted the inference of negligence to be drawn by the jury, then the instruction is not open to criticism, and manifestly this court will not invade the province of the jury and disturb the finding. The trial court defined negligence:

"It is the omission to do something which a reasonable and prudent man guided by those considerations which ordinarily regulate the conduct of his affairs, would do. Or it is the doing

something which a reasonable and prudent man would not do under all the circumstances surrounding and characterizing the particular case." [Trans. Rec. 44.]

The jury, with special knowledge of local conditions, from the circumstances surrounding and characterizing this particular case, determined the question, clearly and succinctly submitted to it, in favor of the defendant in error. The Territorial Supreme Court, likewise having special knowledge of local conditions, held:

"But the effect of these circumstances and facts in establishing negligence on the part of the appellant might be differently construed and considered by different conscientious intelligent men in determining the ultimate fact of negligence. For that reason a submission of the question to the jury by the trial court was eminently proper, and for that reason it cannot be said that the appellee failed to carry the burden of proof." [Trans. Rec. p. 60.]

The decision of the trial court, and of the Territorial Supreme Court that an inference of negligence could be drawn from the facts, is entitled to great respect in this court.

Southern Pacific R. Co. v. Pool, 160 U. S. 440, cited by the plaintiff in error to the point that, where the facts are undisputed, the question of negligence is one of law, must be considered in the light of the facts of that case. In that case this court found: "These being the undisputed facts, there can be *no doubt* that the fatal injury

which Pool received was the result of his own inexcusable negligence." We do not believe that this court intended in the Pool case to announce a different rule from that declared in Grand Trunk R. Co. v. Ives, *supra*, and repeatedly followed. In Warner v. B. & R. Co., 168 U. S. 384 (subsequent to the decision in the Pool case), this court reiterated the rule of the Ives case: "When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury." It was therefore held that the negligence of a person in crossing a railroad track from a depot platform to a standing train which he was about to take, when another train was coming which he did not see, was a question for the jury.

The plaintiff in error has cited, as controlling this case, Charnock v. Texas & Pacific R. Co., 194 U. S. 432. That case is entirely inapplicable to the case at bar and cannot be considered, insofar as expressions therein may be found that would seem to support the plaintiff in error, as an authority in this case. In that case, the car containing the cotton destroyed and for which action was brought against the railroad company, was standing upon a switch or a spur which had been put in for the sole use and convenience of the planters. The car, at the time of its destruction by fire, was not in the actual

custody or control of the carrier. There was no actual delivery to the carrier of the goods of the plaintiff, but in the case at bar the goods, at the time of their destruction, had been received by the plaintiff in error and were under its exclusive care and charge. At Bouse the cars containing the goods of the defendant in error became a part of the regular train of the plaintiff in error, and thereafter the defendant in error ceased to exercise any control over the operation of the cars containing its goods.

The Charnock case could only be accepted as an authority if the goods of the appellee had been destroyed after the cars had been loaded but were still "at the front" and never delivered to the plaintiff in error; for up to the time of the delivery, it might be truly said that the cars were furnished to the defendant in error "at the front" for the convenience of the defendant in error. Surely, it could not have been said in the Charnock case that the carrier would not have been liable if after attaching the cars at a regular station to one of its trains, and thereafter in the actual carriage, of its own volition and for the carrier's sole convenience, had cut out the car from its train and sidetracked and abandoned it on the switch. The latter, however, is the case at bar. We beg to quote from the opinion the facts whereon the Charnock case was based.

"Negligence has always relation to the circumstances in which one is placed, and what an ordinary prudent man would do or omit in such circumstances. Applying that test in the case at bar, we do not think negligence on the part of defendant was established.

"Meekers was not a regular station; indeed, was not a station at all, but a mere switch track. The defendant was not obliged to receive freight there. It was, as said by the Court of Appeals, 'a country or plantation switch,' established and maintained for the accommodation of the planters of the neighborhood. There was no agent or employee maintained there for the purpose of receiving or guarding freight, nor was there fire apparatus kept. Cars were only sent there when ordered, loaded by the shipper, and taken by the first passing freight train to the point of destination. This was the practice for years, and there is not a word of testimony that it was not adequate to the protection of the planters, as it was to their accommodation, or that it was, in their judgment, not a complete fulfilment of the duty of defendant."

194 U. S. 48, p. 1059.

That an inference of negligence could be drawn by the jury from the facts shown in the case, the decision of this court in Marande v. Texas & Pacific Ry. Co., 184 U. S. 173, is of controlling force. This court said:

"It is undoubtedly true that cases are not to be lightly taken from the jury; that jurors are the recognized triers of questions of fact, and that ordinary negligence is so far

a question of fact as to be properly submitted to and determined by them."

And it was held by this court that negligence could be inferred by the jury from each of three propositions:

"First. The manner in which the cotton was stored and the operation of the locomotives in and about the same so as to subject the cotton to danger of fire and to cause the prompt detection of a fire to be so difficult as to render it practically impossible in time to prevent a conflagration.

"Second. That the proof showed negligence in the care of the property inasmuch as the number of watchmen who were engaged were greatly inadequate for the service, and therefore the jury would have been reasonably justified in finding that the destruction of the cotton was occasioned thereby.

"Third. That the jury would have had reasonable ground to infer negligence from the inadequacy of the fire apparatus and from the want of instructions as to its use or competent men to handle it."

In this case the time of night when the cars were sidetracked, the length of time exposed, the locality in which the cars were left, the fact that there was no watchman to guard the cars, all these considered together constitute the facts from which the inference of negligence may be drawn, and that inference was one to be drawn by the jury.

PROXIMATE CAUSE.

This also disposes of the contention that the proximate cause of the loss is not shown. If it be conceded that these facts constituted negligence in the carriage of the goods then it would follow in logical sequence that the negligence was the proximate cause unless and independent, intervening cause is made to appear proximate. As was said in the Marande case, *supra:*

> "That the proof showed negligence in the care of the property inasmuch as the number of watchmen engaged were greatly inadequate for the service and therefore the jury would have been reasonably justified in finding that the destruction of the cotton was occasioned thereby."

It would indeed be a new and novel innovation in the law of negligence should the plaintiff, after he had once shown the negligence of the defendant, be moreover required to demonstrate the causation of the loss from the negligence to a certainty. It has always been deemed sufficient to establish causal relation between wrong and injury sufficient to warrant the damage to be drawn by the jury as a reasonable inference from the wrong. It was therefore held in the Charnock case, *supra,* that the inadequacy of the number of watchmen reasonably justified the jury in finding that the damage was caused thereby. Only if the inference of injury from

the wrong be *sans* reason should a reviewing court interpose.

The learned trial judge instructed the jury that they must first ascertain whether or not the plaintiff in error had been guilty of negligence, and if they did so find, then they must further find whether or not the negligence was the proximate cause of the loss. The jury by their verdict found both questions in favor of the defendant in error. The submission to the jury of the question of proximate cause was eminently proper. The negligence being found, the commission and omission of acts exposing the goods of the defendant in error to dangers of destruction or loss and failure to safeguard the same from injury, the question of proximate cause became one of fact for the jury, and no independent, intermediate efficient cause appearing, the original wrong must be considered as reaching to the effect and proximate to it.

Milwaukee & S. P. R. Co. v. Kellogg, 94 U. S. 470;

Aetna Ins. Co. v. Boon, 95 U. S. 117;

Hays v. Michigan Cen. R. Co., 111 U. S. 228;

The G. B. Booth, 171 U. S. 450;

Hays v. Williams, 17 Colo. 472 (30 Pac. 354);

Pullman P. C. Co. v. Laack, 143 Ill. 260 (18 L. R. A. 220).

"The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments. * * * We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause. But when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it.

"The jury found in substance, that the burning of the mill and lumber was caused by the negligent burning of the elevator, and that it was the unavoidable consequence of that burning. This, in effect, was finding that there was no intervening and independent cause between the negligent conduct of the defendants and the injury to the plaintiff. The judgment must, therefore, be affirmed."

Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 470.

"It is further argued that the direction of the court below (directed verdict for defendant) was right, because the want of offense could not reasonably be alleged as the cause of the injury. In the sense of an efficient cause, *causa causens,* this is no

doubt strictly true; but that is not the sense in which the law uses the term in this connection. The question is, was it *causa sine quanon;* a cause which, if it had not existed, the injury would not have taken place, an occasional cause, and that is a questionable fact, unless the casual connection is evidently not proximate. The rule laid down by Willes, J., in Daniel v. Metropolitan R. Co., L. R. 3 C. P. 216, 222, and approved by the Exchequer Chamber L. R. 3 C. P. 591, and by the House of Lords L. R. 5 H. L. 45, was this: 'It is necessary for the plaintiff to establish by evidence, circumstances from which it may fairly be inferred that there is reasonable probability that the accident resulted from the want of some precaution which the defendant might and ought to have resorted to.'

"The evidence of the circumstances showing negligence on the part of the defendant, which may have been the legal cause of the injury to the plaintiff, according to the rule established in R. R. Co. v. Stout, 17 Wall. 657, and Randall v. B. & O. R. Co., 109 U. S. 478, should have been submitted to the jury."

Hays v. Mich. Cen. R. R. Co., 111 U. S. 228.

"Whether the negligence of the defendant was the proximate cause of the injury was a question of fact, also to be determined by the jury, under proper instructions. We held in Fent v. Toledo P. & W. R. Co., 59 Ill. 349, approving Toledo P. & W. R. Co. v. Pendar, 53 Ill. 451, that whether the alleged negligence was the proximate cause of the injury was, in each case, a question of fact, and expressly repudiated the con-

trary rule as laid down in Ryan v. N. Y. Cen. R. Co., 35 N. Y. 210, as in the teeth of almost numberless decisions, and as unsupported by reason."

Pullman P. C. Co. v. Laack, 143 Ill. 260 (18 L. R. A. 220).

It is claimed, by arguendo, that a tramp or someone must have been an intervening cause. But it was for the jury to say whether or not even this should have been forseen and guarded against by the plaintiff in error.

We respectfully submit that the judgment and decision of the Supreme Court of the territory of Arizona is free from error and that the same should be affirmed.

Respectfully submitted,

ISIDORE B. DOCKWEILER,

A. C. BAKER,

Attorneys for Defendant in Error.

19a

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 147.

SANTA FE, PRESCOTT AND PHŒNIX RAILWAY COMPANY, A CORPORATION, PLAINTIFF,

vs.

GRANT BROTHERS CONSTRUCTION CO., A CORPORATION, DEFENDANT IN ERROR.

ADDITIONAL STATEMENT OF THE CASE BY DEFENDANT IN ERROR.

At about the bottom of page 6 of the brief of plaintiff in error there should have been inserted a statement to the effect that after leaving all of the cars containing the Grant Brothers outfit, except the car of mules, at A. & C. Junction Conductor Dignan (see Transcript of Record, p. 28, fol. 59) "took four cars to Wickenburg. One of these cars consisted

of merchandise, ONE WAS EMPTY, and the other contained mules and horses."

Not one scintilla of testimony was offered at the trial by plaintiff in error to prove that the reason the cars containing Grant Brothers' outfit were not taken to Wickenburg was because there was no room for them there, *and no reason whatsoever has ever been offered why such cars were not taken direct to the objective point, Phœnix.*

The only reference to the subject is in the testimony of Martin McMahon, a superintendent for Grant Brothers (Tr., p. 25, fol. 54 *et seq.*), and Pete Call, a camp foreman (Tr., p. 27, fol. 57), witnesses for defendant in error. McMahon at the time spoke to the conductor at the A. & C. Junction and asked him what he wanted to set them (the cars) out there for (Tr., p. 25, fol. 54 *et seq.*), and in reply the conductor said:

> "They wanted to go there—all camp outfits—that
> " they did not have room for them at Wickenburg
> " as the yards were full of other cars that come in
> " the day before and were on the side track, so that
> " he had no room at Wickenburg. He said that HE
> " THOUGHT that the train that came in the day
> " before with cars from Bouse was still on the side
> " track at Wickenburg, and that there wouldn't be
> " room for these."

But what in point of fact was the *real condition,* at the time, of the yards at Wickenburg was never shown. Neither was it shown why the cars were not taken to Phœnix, beyond Wickenburg. *But it is in evidence* that *an empty car* was taken ahead and the cars loaded with the Grant Brothers camp outfit (the destroyed part of which was valued at $9,031.00) were left on a side track, where no inhabitants were living within four or five miles and where there was no water or water tank or agent, and no person was left in charge of such cars (Tr., p. 28, fol. 59).

We deny the statement of plaintiff (see middle p. 7, Brief of Plaintiff in Error) to the effect that the whole outfit was in the charge and control of the construction com-

pany's superintendent and other employees after the cars containing the Grant Brothers equipment had been attached to the railroad company's regular train, No. 12, at its regular station, called "Bouse."

The goods of the defendant in error consisted of general merchandise, for the carriage of which the railroad company had established a general rate or tariff (Tr., p. 36, fol. 76), and thereby held itself out to the public as a common carrier thereof. Plaintiff in error, in its answer to the court below, admitted that it was a common carrier of goods, freight and passengers for hire generally.

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FILED.
JAN 11 1913
JAMES H. McKENNEY,

IN THE

Supreme Court of the United States

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and
NATIONAL SURETY COMPANY, A CORPORATION,
Plaintiffs in Error,

vs.

GRANT BROTHERS CONSTRUCTION COMPANY, A CORPORATION,
Defendant in Error.

REPLY BRIEF.

ROBERT DUNLAP,
PAUL BURKS,
Attorneys for Plaintiffs in Error.

GARDINER LATHROP,
Of Counsel.

WORTHCOTT-WARREN PRINTING COMPANY, OMAHA.

IN THE

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GRANT BROTHERS CONSTRUCTION COMPANY, A CORPORATION,
Defendant in Error.

REPLY BRIEF.

Under the construction contract the parties were not dealing with each other merely in the relation of common carrier and shipper.

Much space is devoted by our opponents to a narrow application of Hutchinson's test as to whether or not a carrier assumes the duties or responsibilities of a common carrier. The present case does not fall even within the definition or test quoted. Under the construction agreement the Railway Company was to haul the construction outfit, including the

laborers, to and from the points of construction as the same progressed, a large part of that service being necessarily over a line or road not established or opened for general business.

It is safe, however, to say that the mind of man is not capable of formulating any general rule to which exceptions may not be found because of cases not falling within the reason for the rule. Hutchinson's definition w[illegible] deduced or based upon cases in which the parties were acting solely in the relation of common carrier and shipper. Our quotation from Elliott on Railroads is more pertinent. As stated in our former brief, in respect to the construction contract, the Railway Company was acting in its private and not in its public capacity. It was contracting for the construction of a branch line, in which contract and in the furtherance thereof, it assumed to do a part of the work necessary to complete the object of the agreement, namely, the hauling of the necessary outfit, including laborers, to and from the point of construction as the same should progress. The fact that the contract specified that the Railway Company would perform its part, namely, the movement of the outfit, at a stated price, is neither controlling nor important in determining the relation of the parties or their respective capacities. That is shown by the general terms of the contract as that of independent contracting parties. In the end any sums specified on account of the part of the work done by the Railway Company in the furtherance of the contract would be deducted from the bid or contract price of the Construction Company. The Railway Company might have agreed to make no charge what-

ever for its part of the work. In that event no doubt the bid would have been reduced. The limited price it fixed for the movement of the outfit, and which would in the end be deducted from the bid or contract price, no doubt was intended to reflect the approximate cost or out of pocket expense to which the Railway Company would be put in making the movement, and by charging that up against the contractor so as to be necessarily embraced in his bid, that bid would more truly represent to the Railway Company the real cost to it of the construction of this branch line.

Of course the mere fact that less than the tariff rate was prescribed would not, if standing alone, be important in determining the capacities in which the parties were acting. If a railroad company, dealing with a shipper merely as such, should undertake to carry on its established line at less than the tariff rate that would not change the capacity in which it was acting. It would still be acting in its public capacity as a common carrier. In the case at bar, however, it was acting in its private capacity, contracting to secure the construction of a branch line and both parties were acting in the furtherance of a common object. The Construction Company obtained rights and benefits which it could not demand or expect to receive in the capacity of a shipper. It was used as an agency of the Railway Company in the furtherance of its work and the relation of the parties was in no respect different from that of a railway company and an express company under the usual express contract considered by this court in the *Voight* case. In the latter case the railway

company did not haul an express car of the express company. On the contrary it itself furnished the express car, hauled the same in its regular passenger train over its established route, and in that express car was carried the employes and the express freight of the express company.

The fact that the loss occurred at a point on the opened or established line of the Railway Company does not, of course, either alter the terms of the contract or change the relations of the parties as fixed and determined by the construction agreement.

The agreement to haul the laborers and outfit was not independent of and separable from the contract of construction as contended by our opponents. It was an inseparable and dependent part thereof.

If held as acting as a common carrier an agreement to give or receive a special rate would be violative of the Interstate Commerce Law.

Plaintiff's action is based upon the construction contract, a copy of which is attached to the complaint. If that contract is violative of the Interstate Commerce Law the parties thereto would be *in pari delicto*. Opponents only refer to Section 2 of the Interstate Commerce Law, but altogether ignore Section 6 thereof as well as Section 1 of the Elkins Act of 1903, upon which the ruling of this court, in *C. & A. Railroad* v. *Kirby*, 225 U. S., 155, cited by us, was based. We cannot assume the parties intended to violate this law and, therefore, must assume that they did not intend to deal with each other in the relation of common carrier and shipper.

Under the construction contract the railway company assumed "no obligation or risk in case of accident or damage to men and supplies."

It was plainly intended that the Railway Company should be at no risk of liability. The provision is found in the construction contract and in the supplementary letter. It was inserted by laymen and the court should give effect to the obvious intent.

Sexton v. *Kessler*, 225 U. S., 90.

The cases cited by opponent all arose under formal bills of lading or contracts of affreightment in which it plainly appeared the Railway Company was acting in its capacity as a public carrier. We contend such was not the case here and the agreement should, therefore, receive the natural construction the parties evidently intended.

In *New Jersey Steam Navigation Co.* v. *Merchants' Bank*, 6 Howard, 344, cited by opponent, much stress is laid by Mr. Justice Nelson (see pages 382 and 383) upon the fact that the steamboat company acting in its capacity as a common carrier was seeking to relieve itself from an obligation which the law imposed upon it as such. Such contracts (bills of lading) are one sided and would in any event be construed to sustain their validity and would not be given a construction which would render the same invalid.

On page 22 of our brief we cite a number of authorities holding that a stipulation in a free pass, that the transportation is to be at the recipient's risk, includes those likely to be encountered through the negligence of the carrier's servants or otherwise.

In such cases the railway company was not acting as a common carrier.

Question of negligence not for the jury.

It is contended that the question of negligence under the evidence cannot be considered, inasmuch as the written motion for a directed verdict was based solely upon the pleadings and not upon the evidence. It is true such a written motion was presented at the close of plaintiff's case and fully argued, but at the close of all the evidence was merely formally presented. However, every point is preserved in objections to instructions given and assigned as errors. But a specific instruction for a directed verdict (see second assignment of errors) was submitted by defendant and refused, and as embraced in the same instruction defendant also made the following request which was refused:

> "The court instructs you that the plaintiff has failed to show that the defendant was guilty of any negligence in transporting and handling the property of plaintiff and that your verdict should be for the defendant."

The fourth assignment of errors also presents another instruction on this subject. The question was fully presented to the trial court. It is contended, however, that no exceptions were taken to the refusal to give these instructions. In the transcript of record (page 45) it appears that defendant requested the court to give instructions numbered 1, 2, 4 and 5, "which the court refused to give and duly marked 'refused,'" etc. An exception was not necessary under the practice in Arizona as the simple refusal to give the same is sufficient. See:

Revised Statutes of Arizona, 1901, page 450, as follows:

> "1409. (Sec. 200.) Either party may, before the charge is given, present to the court, in writing, such instructions as he desires to have given to the jury, and for this purpose a reasonable time therefor shall be given; the court shall pass on the same, and either give or refuse the same as asked; if given, the judge shall on the margin of each instruction, write the word 'given' in ink, and sign his name thereto in ink; and if refused, he shall, in like manner, write the word 'refused,' and sign his name thereto.
>
> 1410. (Sec. 201.) No further instructions shall be given to the jury after the argument begins. The charge of the court and all instructions asked by either party shall be filed with the clerk and shall constitute a part of the record, and *shall be regarded as excepted to and subject to revision for error, without the necessity of taking exceptions thereto.* The charge and instructions given by the judge may be used by the parties or their attorneys in the argument to the jury."

The point now made was of course not made in the Territorial Supreme Court for obvious reasons.

The evidence failed to show any likelihood or probability of danger from fires at the junction where the cars were left. It was shown to be the custom to leave cars of that character at such sidings. No previous fires were testified to. The engines of the Railway Company operating in that territory were oil burners. They would not throw sparks and if the fireman should neglect his firing valve so that oil might drop if there was any fire to the same it would go out when it struck the roadbed. (Tr., 41, 42.) The uncontradicted evidence was that the right of way at this place was clear

and free of combustible material. The fact that there was no habitation there would simply lessen any danger from fires. If these cars had been taken to the next station of Wickenburg, or even to Phoenix, and set out upon side tracks where there were habitations no night watchman would be set over them to watch or guard against fires because they would not be likely to arise.

It is contended that the jury "with special knowledge of local conditions," etc., determined the question of negligence, and further, that the Territorial Supreme Court "likewise having special knowledge of local conditions," etc., held that the submission of the question of negligence to the jury was proper. The Supreme Court of the territory does not refer to any peculiar local conditions, nor does the brief of our opponent, in the remotest manner, suggest any. While a jury may always use that general knowledge which they possess in common with mankind yet it has been a number of centuries since jurors were permitted to be qualified as witnesses. The question of negligence in any transitory action which need not be tried in the locality of the accident is to be determined by what is shown or produced in the way of evidence, so that either side may have the right to correct any false impressions, and not by what does not appear in the record.

There was no dispute as to the facts or circumstances. That was recognized by the trial court in instructing the jury (see 10th assignment of errors) using the following language: "For the circumstances surrounding this are practically admitted," and the court continued: "was the one act of the railroad company in leaving the cars on the side

track under the circumstances of the case negligent or was it not?"

In the case of *Marande* v. *Texas & Pacific Railway*, 184 U. S., 173, relied upon by opponents, the rule set out in our former brief on this subject was reiterated. In that case the court is at great pains to go into the evidence and show that there was not only a probability but a likelihood of the cotton in question being destroyed by fires from the locomotives, and also that the usual precautions taken at other places to prevent the communication of fire or its spread were not adopted. A large quantity of cotton was piled within a few feet of the railway tracks on which engines were frequently moving. It was shown that fire could easily be communicated to the cotton and would smolder for some time before breaking out; that no tarpaulins or other devices were used to protect the cotton against sparks emitted or cinders dropped, and that in view of the risk of fires being thus communicated from the railway engines proper guards were not placed to protect such inflammable commodity as were used in other places. The engines there used being coal burners were likely to emit sparks from the stack or to drop cinders from the ash pan. That case was entirely different from the one at bar. There there was every probability of fires being communicated from the engines and the cotton was of an inflammable nature. In the case at bar there was shown to be no such danger and no probability or likelihood of fire being communicated to the cars standing upon the side-tracks. There was no evidence even of evil disposed persons frequenting that neighborhood who would be likely to start such a fire.

In the case of *Milwaukee, etc., Railway* v. *Kellogg*, 94 U. S., 470, the simple question was whether the railway company should have anticipated that on account of a high wind prevailing a fire negligently set out by it would spread as far as it did and do the damage which was actually done. In that case it was held for the jury to determine whether the railway company having negligently set out the fire ought not to have anticipated that it was likely to spread as far as natural conditions would carry the same.

If we assume, therefore, that the Railway Company was acting as a common carrier, even then, in view of the contract, the burden was upon the plaintiff to show that the loss was caused by the Railway Company's negligence. It is not sufficient merely to show that there was some negligence in some respect to enable plaintiff to recover, but it would be necessary to show that the negligence claimed was actionable, that is to say, was the proximate cause of the loss. The court left it to the jury, without explanation, to determine whether leaving the car upon the sidetrack was the proximate cause of the loss. But the fire which caused the damage was not shown to be likely to occur at that place and the Railway Company was not bound to anticipate and provide against what might be remotely or slightly probable.

Respectfully submitted,

ROBERT DUNLAP,
PAUL BURKS,
Attorneys for Plaintiffs in Error.

GARDINER LATHROP,
Of Counsel.

SANTA FE, PRESCOTT & PHŒNIX RAILWAY COMPANY *v.* GRANT BROTHERS CONSTRUCTION COMPANY.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 147. Argued January 24, 1913.—Decided April 7, 1913.

A rule of law restricting the right of contract which rests on principles of public policy, because of the public ends to be achieved, extends no further than the reason for it and does not apply to contracts wholly outside of and not affecting those ends.

The rule that common carriers cannot secure immunity from liability for their own negligence has no application when a railroad company is acting outside the performance of its duty as a common carrier. In such a case the ordinary rules of law relating to contracts control.

A contract made by a railroad company for construction work is one made outside of the performance of its duty as a common carrier, and a stipulation that the contractor, in consideration of lawfully reduced rates for transportation of supplies and employés, will assume all risk of damage of any kind even if occasioned by the company's negligence, is not void as against public policy. *Balt. & Ohio Ry. Co.* v. *Voight*, 176 U. S. 498, followed; *Railroad Co.* v. *Lockwood*, 17 Wall. 357, distinguished.

In dealing with transportation of supplies and employés of contractors in connection with construction and improvement of its own road, a railroad company does not act as a common carrier; arrangements made in good faith with such contractors for free or reduced rates are not violations of the prohibitions of the Interstate Commerce Act against rebates. See *Matter of Railroad-Telegraph Contracts*, 12 I. C. C. Rep. 10.

Where no rule of public policy denies effect to stipulations in a contract, the highest public policy is found in enforcing the contract as actually made.

Courts are not at liberty to revise contracts. They can only determine what the parties meant by the terms and expressions as used.

In this case *held* that expressions to effect that the contractor assumed "all risk and damage" and the railroad company assumed "no obligation or risk" in a contract between a railroad company and

contractor for construction of roadbed and not in connection wit duties as a common carrier, included damage caused by the com pany's own negligence.

Quære to what extent a contractor can by a stipulation, valid as t himself and in consideration of reduced rates of transportatio exempt a railroad company from liability to his employés for dam ages sustained by them from negligence of the railroad compan while transporting them.

13 Arizona, 186, reversed.

THE facts, which involve the construction of a contrac between a railway company and a construction contrac tor and the liability of the former for materials belong ing to the latter destroyed by fire, are stated in the opinion.

Mr. Gardiner Lathrop, with whom *Mr. Robert Dunlap* and *Mr. Paul Burks* were on the brief, for plaintiffs in error.

Mr. Isidore B. Dockweiler, with whom *Mr. A. C. Baker* was on the brief, for defendant in error:

The railroad company was a common carrier of the goods destroyed, and hence, could not by contract ab- solve itself from liability to the defendant in error for its acts of negligence.

For the true test to determine whether a party is a common carrier, see 1 Hutchinson on Carriers, § 48, 3d ed.; all the elements of which test are found and fully satisfied in the case at bar.

Plaintiff in error undertook to carry goods of the kind destroyed, to wit, miscellaneous merchandise, such as railroads usually carry, and for which it had an established tariff rate, by the methods by which its business was con- ducted and over its established road.

The transportation was for hire, for the established tariff rate of "one cent per mile per ton" as set forth in the agreement.

Plaintiff in error owed an actionable duty to the defendant in error to transport the latter's goods of the class and kind destroyed.

The plaintiff in error being a common carrier with respect to the goods shipped by defendant in error, then, though the carriage was by special contract, it still remained a common carrier. *Railroad Co.* v. *Lockwood*, 17 Wall. 376; *Liverpool &c. St. Co.* v. *Phœnix Ins. Co.*, 129 U. S. 397; *Mears* v. *N. Y., N. H. & H. R. Co.*, 75 Connecticut, 171.

Plaintiff in error having no right to refuse to carry the goods of defendant in error, could not contract for their carriage in any capacity except as a common carrier. *Liverpool & G. W. S. Co.* v. *Phœnix Ins. Co.*, 129 U. S. 397; 4 Elliott on Railroads, pp. 11, 12; 1 Hutchinson on Carriers, § 44; *C. W. & St. L. R. Co.* v. *Wallace*, 66 Fed. Rep. 506.

The fact that the contract of carriage of the destroyed goods of the contractor was incidental to a contract having for its principal object the construction of a subsidiary line of plaintiff in error cannot change the character of plaintiff in error to that of a private carrier.

Being a common carrier, plaintiff in error could not by contract absolve itself from liability to the shipper for its acts of negligence. *B. & O. S. W. Ry. Co.* v. *Voigt*, 176 U. S. 498; *The Kensington*, 183 U. S. 263.

To hold the railroad company as a common carrier does not render the contract violative of the Interstate Commerce Law.

The Interstate Commerce Commission has construed the statute as not preventing "a common carrier from giving free or reduced rate carriage over its lines to contractors for materials, supplies and men. 12 I. C. C. Rep. 11.

The object of the statute is "to secure just and reasonable charges for transportation," and "to prevent unjust

discrimination in the rendition of services under similar conditions."

The case at bar is an action *ex delicto* and not *ex contractu*.

The contract of carriage did not in terms exempt the railroad company from liability for its acts of negligence, and, therefore, the exemption contracted for was from loss occasioned by the dangers naturally incident to the carriage, and not from damage brought about by the carrier's negligence. *N. J. St. N. Co.* v. *Bank*, 6 How. 344; *Maynard* v. *Syracuse Ry. Co.*, 71 N. Y. 183; 4 Elliott on Railroads, § 1508; 1 Hutchinson on Carriers, § 463 (3d ed.); Monographic Note, 88 Am. St. Rep. 68, p. 119.

The determination of the question of negligence was properly submitted to the jury.

Neither the question of negligence, nor the question whether such negligence was the proximate cause of the loss, properly arises upon this appeal. Those were finally settled below.

The facts of the case being such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter was for the jury, and their verdict will not be disturbed on appeal. *Grand Trunk Ry.* v. *Ives*, 144 U. S. 408; 21 Enc. Law, 498; *Marande* v. *Tex. & Pac. Ry. Co.*, 184 U. S. 173.

The negligence being found, the commission and omission of acts exposing the goods of the contractor to dangers of destruction or loss and failure to safeguard the same from injury, the question of proximate cause became one of fact for the jury, and no independent, intermediate efficient cause appearing, the original wrong must be considered as relating to the effect and proximate to it. *Mil. & St. P. R. Co.* v. *Kellogg*, 94 U. S. 470; *Aetna Ins. Co.* v. *Boon*, 95 U. S. 117; *Hays* v. *Mich. Cen. R. Co.*, 111 U. S. 228; *The G. B. Booth*, 171 U. S. 450; *Hays* v. *Williams*,

17 Colorado, 472; *Pullman P. C. Co.* v. *Laack*, 143 Illinois, 260.

MR. JUSTICE HUGHES delivered the opinion of the court.

The Grant Brothers Construction Company recovered judgment in the District Court of the Territory of Arizona for $9,061 for the loss of its property by fire on June 6, 1907, between Bouse and Phœnix, Arizona, while in course of transportation on the railroad operated by the Santa Fe, Prescott & Phœnix Railway Company, the plaintiff in error. The judgment was entered upon a verdict of a jury, a motion for a new trial was denied, and the judgment was affirmed by the Supreme Court of the Territory, 13 Arizona, 186.

The Railway Company had been engaged in building, westerly from its main line, a branch railroad known as the Arizona and California Railroad. For this purpose it entered into a contract with the Construction Company for the necessary grading. The property in question consisted of the camp and grading outfit, and supplies, belonging to the Construction Company, which had been used by it in this work, and was being removed by reason of its completion. At the time in question the branch line was operated regularly only as far as Bouse and the property was loaded on cars "at the front" or end of track, about twelve miles west of that station, to be carried to Phœnix. The superintendent, foremen and about fifty workmen of the Construction Company were taken on the cars at the same place for the same destination.

The cars were hauled by the Railway Company to Bouse (where explosives and hay were unloaded), and were there attached to a regular train which brought them to a point known as the A. and C. Junction, where the Arizona and California line joined the main line of the

Railway Company. At this junction (which was about four miles from Wickenburg, a station on the main line in the direction of Phœnix) all the cars containing the outfit of the Construction Company, save one, were cut out of the train and were put upon a side-track. The rest of the train, with the employés of the Construction Company, went on to Wickenburg. This took place late in the evening of June 5, 1907, and about ten o'clock in the morning of the next day, four of the cars left on the side-track were destroyed by fire.

The A. and C. Junction is described as being in an open desert, without a station agent or inhabitants, and without water or fire apparatus. The cars were left without a watchman in charge. The reason given by the conductor for leaving them at this point was that there was no room for the cars at Wickenburg. There was no explanation of the cause of the fire, the only suggestion, as to this, being that before the fire occurred one train passed by, between four and five o'clock in the morning.

At the close of the evidence the Railway Company requested the trial court to direct a verdict in its favor. This request was refused and exception taken; and the sustaining of this ruling is assigned as error. It is contended by the Railway Company that, under its contract with the Construction Company, it was exempt from all liability and, further, that even assuming it to be liable for negligence there was a total failure of proof in that respect.

The principal question relates to the scope and validity of the provision of the contract between the parties as to the liability of the Railway Company.

The facts are these: In November, 1904, the Railway Company issued a call for proposals for the grading of the roadbed, clearing right-of-way, making necessary canals, etc., of the Arizona & California Railroad, for a distance of about forty miles. The Construction Company made a

bid, which was accepted, and a contract was executed accordingly on December 12, 1904.

This contract, after providing for the performance of the described work of grading, etc., contained the following terms with respect to the transportation of supplies, camp and grading outfit and employés of the Construction Company, which were the same as those set forth in the call for bids:

"14. Water will be delivered in cars at the end of the track at the rate of One Dollar and Fifty Cents ($1.50) per 1000 gallons and supplies will be hauled to End of Track, both in the usual manner of construction trains, subject to delays, etc., incident thereto. All risk of loss or damage to be borne by the Contractor.

"15. The Company will furnish a rate of one cent per ton mile from all points on the S. F. P. & P. Road and leased roads for the Contractor, on Camp and Grading Outfit and supplies, corral supplies, etc., except explosives and commissary goods, and return to original shipping points at same rates, on completion of the work. All movements of goods at less than tariff rates to be at consignee's risk of loss and damage.

"16. The Company will also furnish the Contractor's employés . . . a rate of one cent per passenger mile, . . . and return those who have worked until the completion of contract at the same rate. Passengers carried at less than tariff rates will be required to assume all risk of accidents to person and baggage. The plan of movement of these employés and freight is to be according to rules of the General Freight and Passenger Agent.

"17. The Company will also secure for the Contractor similar rates over the Santa Fe Company's Coast Lines, on Camp and Grading Outfit, in carload lots, both to and from the work, and for workmen going to the work in lots of five (5) or more."

After the work covered by this contract had been finished it was agreed that the Construction Company should continue the grading of the road further to the west, upon the same terms and conditions as those stated in the former contract, save that the prices for the work were increased, and it was provided that water should be delivered at the end of track free of cost, except for car-hire, and that men and supplies should be hauled free on the line of the Arizona & California Railroad, between the A. and C. Junction and the end of track. This supplementary agreement, which was evidenced by letters exchanged in November, 1905, also contained an express provision "that the company shall assume no obligation or risk in case of accident or damage to men and supplies."

It was under these conditions that in June, 1907, the Railroad Company,—the grading having been done—took up the men, outfit and supplies of the Construction Company at the end of the track for the purpose of transporting them to Phœnix.

It is alleged in the complaint that the transportation of the property was to be at the contract rate of one cent per ton mile and it is undisputed that this was less than the tariff rates of the Railway Company accorded to the general public.

It is the established doctrine of this court that common carriers cannot secure immunity from liability for their negligence by any sort of stipulation. *Railroad Company* v. *Lockwood*, 17 Wall. 357; *Liverpool Steam Co.* v. *Phenix Insurance Co.*, 129 U. S. 397; *Baltimore & Ohio &c. Railway Co.* v. *Voigt*, 176 U. S. 498, 507; *Knott* v. *Botany Mills*, 179 U. S. 69, 71; *The Kensington*, 183 U. S. 263, 268. The rule rests on broad grounds of public policy justifying the restriction of liberty of contract because of the public ends to be achieved. The great object of the law governing common carriers was to secure the utmost care in the rendering of a service of the highest importance to the

community. A carrier who stipulates not to be bound to the exercise of care and diligence "seeks to put off the *essential duties* of his employment." It is recognized that the carrier and the individual customer are not on an equal footing. "The latter cannot afford to higgle or stand out and seek redress in the courts. . . . He prefers, rather, to accept any bill of lading, or sign any paper the carrier presents; often, indeed, without knowing what the one or the other contains. In most cases, he has no alternative but to do this, or abandon his business." *Railroad Company* v. *Lockwood*, *supra*, pp. 378, 379. For these reasons, the common carrier in the prosecution of its business as such is not permitted to drop its character and transmute itself by contract into a mere bailee with right to stipulate against the consequences of its negligence.

Manifestly, this rule has no application when a railroad company is acting outside the performance of its duty as a common carrier. In such case, it is dealing with matters involving ordinary considerations of contractual relation; those who choose to enter into engagements with it are not at a disadvantage; and its stipulations even against liability for its own neglect are not repugnant to the requirements of its public service. The rule extends no further than the reason for it. It is apparent that there may be special engagements which are not embraced within its duty as a common carrier although their performance may incidentally involve the actual transportation of persons and things, whose carriage in other circumstances might be within its public obligation. *Baltimore & Ohio &c. Railway Co.* v. *Voigt*, 176 U. S. 498, and cases cited; *Northern Pacific Railway Co.* v. *Adams*, 192 U. S. 440; *Long* v. *Lehigh Valley R. R. Co.*, C. C. A., 2d Circuit, 130 Fed. Rep. 870.

Thus in *Baltimore & Ohio &c. Railway Co.* v. *Voigt*, *supra*, it was held that an express messenger in charge of

express matter in pursuance of the contract between the express company and the railroad company was not a passenger of the latter within the meaning of the rule of *Railroad Company* v. *Lockwood, supra;* that he was not constrained to enter into the contract whereby the railroad company was exonerated from liability to him for its negligence; and that such a contract did not contravene public policy. His position was one "created by an agreement between the express company and the railroad company, adjusting the terms of a joint business—the transportation and delivery of express matter. His duties of personal control and custody of the goods and packages, if not performed by an express messenger, would have to be performed by one in the immediate service of the railroad company." It was clear that although the messenger was actually carried on the train, and although the railroad company received compensation in connection with its contract for the express business, his relation to the railroad company was "widely different from that of ordinary passengers," and there was no justification for extending the doctrine restricting the freedom of contract to a case which lay entirely outside the reason which supported it.

In constructing, improving or repairing its road, and in building its extensions and branches, the railroad company is providing facilities for its service as a common carrier, but of course is not acting as such. It may do the work itself, if it chooses, or it may make it the subject of contract with another. In the latter case it simply employs an appropriate agency. The haulage by the railroad company of the men, appliances and supplies, required by the contractor for the purpose of the construction or improvement, to or from the point on its line where the work is to be done, is merely incidental to the work itself. The cost of such haulage is obviously an item of expense which must be taken into account in fixing the

terms of the construction contract, and in providing for it over its own line the railroad company may adjust the matter with the contractor as it sees fit. If the railroad company did the work directly it would have to take its employés and the necessary outfit to the place of work, and it may undertake to do the like for the contractor, either free of charge or at reduced rates, as they may agree.

Usually, necessity or proper convenience requires an undertaking by the railroad company, as to such transportation, which it would be under no obligation to assume in any event as a common carrier. Men and supplies must be put down and taken up at points on the line where there is no regular station and where the railroad company would not be bound to accept or to discharge freight or passengers. In a case, like the present one, of the grading of an extension or branch line, it is convenient that the track, laid as the roadbed is prepared for it, should be utilized for the hauling of men and materials to a point as near as possible to the work, although such track is not open to the public and the railroad company as a common carrier has assumed, as yet, no obligation for general transportation over it. This was obviously contemplated in the contract in question; and a construction of the contract, so as to make it apply only to the hauling of camp and grading outfit to stations to which the company was regularly doing business, is wholly inadmissible. The original proposals stated that the Railway Company hoped "to keep the end of the track within four miles of the nearest grading camp." The contract itself provided that water and supplies should "be hauled to end of track, both in the usual manner of construction trains." And, after providing for the reduced rates for outfit, supplies and employés from all points on the line of the Railway Company and for the return of the same to original shipping points at the same rates on completion of the work, the intent is shown by the pro-

vision immediately following that the Railway Company should secure similar rates for the contractor over its coast lines "on camp and grading outfit, in carload lots, *both to and from the work.*" In the supplementary contract it was provided that men and supplies should be hauled "to the end of track free," with the provision that this should only apply on the line of the Arizona and California Railroad, that is, "between A. and C. Junction and the end of the track." When the work was done, the men and outfit were actually taken up by the Railway Company some twelve miles beyond the last regular station on the branch line. The parties plainly intended that the camp and grading outfit should be transported for the benefit of the contractor as near to the work as it reasonably could be, and without regard to regular stations, and that it should be removed in the same way when the grading was completed.

It is clear that in dealing with transportation of this character over its own road, in connection with construction or improvement, a railroad company is not acting in the performance of its duty as a common carrier, and the arrangement for free or reduced-rate carriage for the necessary materials and men used in the work, when it is a part of the contract, entered into in good faith and not as a subterfuge, is not obnoxious to the provisions of law prohibiting departures from the published tariffs, for the reason that such an agreement lies outside the policy of these provisions. See *Matter of Railroad-Telegraph Contracts*, 12 I. C. C. Rep. 10, 11.

The parties then were free to make their own bargain as to this transportation and the liability which should attach to it. There is no rule of public policy which denies effect to their expressed intention, but on the contrary as the matter lies within the range of permissible agreement, the highest public policy is found in the enforcement of the contract which was actually made. Undoubtedly, it

is not to be lightly concluded that the Railway Company has been relieved from liability for its neglect, but on the other hand, if this was the agreement as fairly interpreted, it is not to be arbitrarily overridden. The parties were on an equal footing. The risk of loss or damage to the grading outfit or supplies from any cause while being transported over the line of the Railway Company, could be assumed by one party or the other as they saw fit. This risk was an item which naturally would enter into the calculations of the parties with respect to the rate to be charged by the Railway Company. We are not at liberty to revise the contract, and the question simply is whether the stipulation against liability in view of the reduced rates covered all losses, those which might be due to the carrier's neglect as well as others.

We entertain no doubt as to what the parties meant. The limitations upon the liability of the Railway Company were first fully stated in the call for proposals and when the bid was accepted in accordance with the terms of the call, the same limitations were inserted in the contract. Thus, it was provided with respect to the supplies to be hauled to the end of track; "All risk of loss or damage to be borne by the Contractor;" again, as to the camp and grading outfits and supplies; "All movements of goods at less than tariff rates to be at consignee's risk of loss and damage;" and with regard to the employés; "Passengers carried at less than tariff rates will be required to assume all risk of accident to person and baggage." Further, in the supplemental agreement, it was stipulated: "the Company shall assume no obligation or risk in case of accident or damage to men and supplies." When we consider the circumstances of the parties and the objects of the contract, we cannot escape the conclusion that these reiterated statements evidence the intention to deal comprehensively with *all* the risks incident to the transportation, not excluding the obvious risk of loss by reason of some neglect in the

operation of the road. The contract was between two corporations and dealt with the familiar transactions of their everyday concerns. The stipulations are in the terse language of business men. The supplemental contract is contained in an informal letter. And, when "all risk of loss or damage" is spoken of, and it is provided that the Railway Company shall assume "no obligation or risk in case of accident or damage," it is evident that they are looking at the matter from a business standpoint and are bargaining for a reduced rate to be charged by the Railway Company on the one hand and an assumption of the entire risk of the transportation by the Construction Company on the other. It is true that general words of exemption have often been found insufficient to cover injuries due to negligence, and a rule imposing such a limitation upon their effect has manifest propriety in those jurisdictions where common carriers, acting as such, are allowed to stipulate against the consequences of their neglect if this is done in explicit terms. But here, to repeat, we are entirely out of the domain governed by the rule of public policy affecting common carriers, and the agreement must be taken according to its actual intent.

It will be observed that the limitation from liability was to apply to the workmen as well as to the goods. We do not need to inquire as to the effect of such an exemption in the case of a workman who had not assented to it. But the provisions as to the workmen throw light upon the intent of the parties with respect to the property. In the supplemental contract both men and supplies were grouped in one stipulation for immunity. The Railway Company, however, would not have been liable in any event for injuries to the workmen save in case of negligence; and in bargaining for a limitation of liability as to the workmen, they evidently had negligence in view. The word "accident" in this connection was manifestly used in its popular sense and not as limited to occurrences beyond the

carrier's control. Further, it will be remembered, that in the supplemental contract, free haulage was given over the branch line and the stipulation, therein repeated, was certainly to protect the carrier from a liability, in the case of injury to the workmen, which otherwise would attach; that is, a liability for negligence.

This point was recognized by the court in *Railroad Company* v. *Lockwood*, 17 Wall. 357, which involved the obligation of a common carrier. The contract for exemption from liability was general, but it related to a drover accompanying his cattle (who, notwithstanding that he had a pass, was held to be a passenger for hire) as well as to the cattle themselves; and with respect to the drover, it was assumed in the course of the opinion that the stipulation included immunity from liability for the company's negligence. And thus the court was brought to the decision of the question whether a common carrier could be permitted to make a stipulation of that sort. The court said: "It is strenuously insisted, however, that as negligence is the only ground of liability in the carriage of passengers, and as the contract is absolute in its terms, it must be construed to embrace negligence as well as accident, the former in reference to passengers, and both in reference to the cattle carried in the train. As this argument seems plausible, and the exclusion of a liability embraced in the terms of exemption on the ground that it could not have been in the mind of the parties is somewhat arbitrary, we will proceed to examine the question before propounded, namely, whether common carriers may excuse themselves from liability for negligence" (*id.*, pp. 362, 363).

The question as to the fair interpretation of language such as is used in the present case, where the railroad company is acting outside the performance of its duty as a common carrier was considered by the Circuit Court of Appeals in the Second Circuit in *Long* v. *Lehigh Valley*

R. Co., 130 Fed. Rep. 870. That was the case of an express messenger who was injured while employed as such in an express car on one of the defendant's trains, owing to the negligence of the defendant's employés. His contract with the express company contained a provision that he assumed "all risk of accidents and injuries" to himself "arising out of such employment," and that he released the express company and the transportation lines on which he was to render service from any claims "arising out of any such accidents or injuries" that might happen to him while so employed. Circuit Judge Wallace in delivering the opinion of the court, after referring to *Baltimore & Ohio &c. Ry. Co.* v. *Voigt*, 176 U. S. 498, said: "It is said that the contract in that case in terms included among the risks assumed by the express messenger accidents and injuries occasioned by negligence, while the contract here does not; and it is urged that, in the absence of such a stipulation, the contract should be construed not to extend to that class of accidents or injuries. This contention would doubtless be sound if the parties contracting had not been treating on terms of equality, as is the case between a common carrier and a shipper of goods or a passenger. But when this is not the case, and no rule of public policy forbids a contract by which one of the parties is exonerated from any risk arising from negligence, there is no reason why the ordinary rules of construction should not obtain, and the contract be given effect according to the intention of the parties. The observations of this court in *McCormick* v. *Shippy*, 124 Fed. Rep. 48, 59 C. C. A. 568, are appropriate: 'There is no question of public policy involved in this contract, as in the case of a common carrier. It is well settled that the parties in such a case have the right to provide by apt language against liability for negligence. . . . The clause must be interpreted to include loss through negligence, because for loss not arising from negligence he would not be liable.'

"So, in this case, the defendant, being merely a private carrier in respect to the plaintiff, owed him merely the duty of ordinary care, and could only have been liable to him for injuries arising from negligence, and the release made in advance must have contemplated accidents and injuries of that character. In *Bates* v. *Railroad Company*, 147 Massachusetts, 255, *S. C.*, 17 N. E. Rep. 633, the agreement between the express messenger and the express company was that the former 'will assume all risk, and [of] accidents and injuries resulting therefrom, and will hold said company free and discharged from all claims and demands in any way growing out of any injuries received by him while so riding.' In *Hosmer* v. *Railroad Company*, 156 Massachusetts, 506, 31 N. E. Rep. 652, the plaintiff was an expressman, and had agreed that, in consideration of the company's allowing him to ride in baggage cars on its trains, he would 'assume all risk of accidents and injuries resulting therefrom.' In both cases the language of the contract, although not expressly including injuries or accidents by negligence, was construed to relieve the railroad company from liability for injuries by negligence. In *Chicago &c. R. Co.* v. *Wallace*, 66 Fed. Rep. 506, *S. C.*, 14 C. C. A. 257, *S. C.*, 24 U. S. App. 589, *S. C.*, 30 L. R. A. 161, the language of the contract was as general as it is in the present case, and the railroad company was exonerated from liability" (130 Fed. Rep. p. 873).

We see no ground whatever for the conclusion that it was not the intention of the parties to give the Railroad Company immunity from negligence in the case of the workmen, and in view of the provisions and purpose of the contract it cannot be held that they had a different intention with respect to the camp and grading outfit and supplies. When they agreed that all movement of this property at less than tariff rates should be at the risk of the Construction Company and later in the supplemental contract that the Railway Company should

assume "no obligation or risk" in the case of damage to supplies, we think it clear that they meant to cover the entire transportation risk, with respect to this property and that losses such as occurred in this case, whether or not attributable to the negligence of the Railway Company were within the stipulated immunity.

It is therefore unnecessary to discuss the assignments of error which are based upon the ruling of the court with respect to the submission to the jury of the question of negligence. Our conclusion is that, upon the facts disclosed at the trial, the Railway Company was entitled to a direction of a verdict in its favor, and the judgment sustaining the recovery by the Construction Company must therefore be reversed.

The judgment is reversed and the case remanded to the Supreme Court of the State of Arizona as the successor of the Territorial Supreme Court, for such further proceedings as may not be inconsistent with this opinion.